IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. **76-809**

THOMAS BRENNAN, et al.,

Petitioners,

v.

KEVIN ARMSTRONG, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners are the individual members of the Board of School Directors of the City of Milwaukee, the Superintendent of Schools, and the Secretary-Business Manager of Schools. They pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 23, 1976.

OPINIONS BELOW

The July 23, 1976 opinion of the United States Court of Appeals for the Seventh Circuit is reported at 539 F.2d 625 and is reproduced in the Appendix at pages 1-20. The order denying petitioners' Petition for Rehearing in Banc was entered on September 22, 1976, without opinion, and is reproduced in the Appendix at page 21. The January 19, 1976 opinion of the United States District Court for the Eastern District of Wisconsin is reported at 408 F.Supp. 765, and is reproduced in the Appendix at pages 22-139. The Partial Judgment entered by the United States District Court for the Eastern District of Wisconsin on January 19, 1976 is not reported but is reproduced in the Appendix at pages 140-141. The orders of the District Court specifying desegregation guidelines are reported at 416 F.Supp. 1344 and 416 F.Supp. 1347, and are reproduced in the Appendix at pages 142-151.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 23, 1976. A timely petition for rehearing in banc was denied on September 22, 1976, and this petition for certiorari will be filed within 90 days of the date of denial. This Court's jurisdiction is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1) and Rule 22(3) of the Supreme Court Rules.

QUESTIONS PRESENTED

1. Does a school district which adopted a neighborhood school policy decades before substantial numbers of black students resided in the district and which later develops non-governmentally caused residential racial concentration violate the Constitution by uniformly and consistently adhering to that neighborhood school policy in the good faith belief that it provides the best educational opportunity for all students regardless of race?

2. In such a district, does a school board which in good faith believes that a neighborhood school policy provides the best educational opportunity for all students regardless of race evidence segregative intent by not adopting programs inconsistent with that policy even though they will improve student racial balance?

3. In a school desegregation case, if the court does not identify any school as "segregated" as defined in *Keyes v. School District No. 1* and specific references are made to only a few of the more than 150 schools in the district, may the court hold the entire school system unconstitutionally segregated and order a complete dismantling of the system and approximate district-wide student and faculty racial ratios in each school?

4. Did the Circuit Court err in applying the "clearly erroneous" standard of review to ultimate and conclusory findings of the District Court?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment to the United States Constitution, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

20 U.S.C. Section 1701(a) (Supp. V, 1976)[1] provides in relevant part:

"The Congress declares it to be the policy of the United States that –

. . .

"(2) the neighborhood is the appropriate basis for determining public school assignments."

20 U.S.C. Section 1704 (Supp. V, 1976) provides:

"The failure of an educational agency to attain a balance, on the basis of race, color, sex, or national origin, of students among its schools shall not constitute a denial of equal educational opportunity or equal protection of the laws."

20 U.S.C. Section 1705 (Supp. V, 1976) provides:

"Subject to the other provisions of this subchapter, the assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of race, color, sex, or national origin, or the school to which such student is assigned was

1. 20 U.S.C. Sections 1701-1758 were enacted as part of the Education Amendments of 1974 to the Elementary and Secondary Education Act of 1965. Act of August 21, 1974, Pub.L. No. 93-380, Title II, Sections 201-259, 88 Stat. 514-521. Section 201 of the Act provided that this title may be cited as the "Equal Educational Opportunity Act of 1974."

located on its site for the purpose of segregating students on such basis."

20 U.S.C. Section 1712 (Supp. V, 1976) provides:

"In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws."

20 U.S.C. Section 1752 (Supp. V, 1976) provides:

"Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with respect to race, sex, religion, or socioeconomic status, the effectiveness of such orders shall be postponed until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired. This section shall expire at midnight on June 30, 1978."

STATEMENT OF THE CASE

This petition presents for decision an unsettled legal issue of significance to every resident of a school district with a neighborhood school policy and racial residential

concentration.[2] Given the District Court's specific findings of uniform and consistent good faith adherence by the Board to its neighborhood school policy, and the sound educational reasons for the innumerable consistent decisions made during the policy's more than fifty year history, it is unlikely that this Court will ever be presented with a clearer neighborhood school policy case.

Both the District and Circuit Courts phrased their conclusions in terms of the *Keyes* intent test; the phrasing, however, is more form than substance – more obfuscating than illuminating. If *Keyes* is controlling, the District Court's conclusion is wholly inconsistent with its findings of fact and the Circuit Court's affirmance perpetuates this error. In fact, the decisions of both courts makes sense only if (a) a racially neutral neighborhood school policy is unconstitutional *per se* in districts with racial residential concentration or (b) the courts' conclusions are based on a statistical, foreseeability approach to intent, without regard to purpose or motivation.

A. Procedural History

This action originated in 1965 with the filing of a complaint seeking declaratory and injunctive relief concerning various alleged acts of the Board of School Directors of the City of Milwaukee, its Superintendent, its Secretary-Business Manager and the individual members of that body (hereinafter collectively referred to as "the Board"). The Board was alleged to have violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Federal jurisdiction was invoked under 28 U.S.C. Section 1343, the jurisdictional counterpart of 42 U.S.C. Section 1983. The plaintiffs were certain black and white students and their parents, who were class representatives.

2. This Court in *Keyes v. School District No. 1*, 413 U.S. 189 (1973) specifically reserved the constitutionality of unmanipulated neighborhood school policies. *See* p. 14, *infra.*

Thirty trial days were concluded on January 31, 1974. Almost two years later, on January 19, 1976, the District Court for the Eastern District of Wisconsin entered and filed a Decision and Order (including Findings of Fact and Conclusions of Law) and a Partial Judgment concluding that the Board "engaged in practices with the intent and for the purpose of creating and maintaining a segregated school system, and that such practices had the effect of causing current conditions of segregation in the Milwaukee public schools" (A. 125).[3] The Board was enjoined from discriminating upon the basis of race in the operation of the schools and from "creating, promoting, or maintaining racial segregation" (A. 141).

In certifying the case for appeal pursuant to 28 U.S.C. Section 1292(b), the District Court concluded that "[t]he issues here decided are of public importance, concerning as they do the duties imposed upon school officials by the Constitution" (A. 139). A petition for permission to appeal was filed with the United States Court of Appeals for the Seventh Circuit on January 29, 1976. Permission was granted on February 4, 1976 (Misc. No. 76-8005). A panel of the Circuit Court consisting of Judges Philip W. Tone, Harlington Wood, Jr. and Robert A. Grant affirmed the District Court decision on July 23, 1976. A timely petition for rehearing in banc was denied without opinion on September 22, 1976.

B. Description of the Milwaukee Public School System and Its Policies.

The Milwaukee school system, whose boundaries are coterminus with those of the City, is one of the fifteen largest public school systems in the United States (155 schools and approximately 128,000 students in 1973) (A. 2, 40). Since 1950, Milwaukee's geographic area and total

3. A. ___ references are to the Appendix which is bound separately.

All references to pp. 36-113 of the Appendix are to specific findings of fact of the District Court.

student population has doubled and the number of schools has increased 71% (A. 2, 40).

Between 1950 and 1970 the City's black population multiplied fivefold from 3.5% (21,722) to 14.5% (105,088) of the total population (A. 2, 40-41). During that same period, the number and percentage of black students rose at almost twice that rate, with blacks comprising about 35% of the student population at the time of trial (A. 2-3, 41).

The overwhelming majority of Milwaukee's black population has tended to reside in an area in the north central and northwestern central part of the City (A. 41). Neither "state action" nor racially imbalanced schools have caused the racial residential concentration (A. 132). Black residential concentration has been determined primarily by the occurrence of residential vacancies in combination with the particular needs, desires, and incomes of black citizens (A. 42-43).[4] No statute, local regulation, policy or ordinance requiring segregation of the races has ever existed in Wisconsin or Milwaukee.

In 1919, long before the presence of any significant number of black students, the Board adopted a neighborhood school policy. Subsequent Boards have consistently adhered to that policy, in the good faith belief that it provides Milwaukee's students with the best possible education which limited available resources permit (A. 43-44, 102). The

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4. These findings of the District Court correspond to the recent recognition by three members of this Court that

> "[t]he principal cause of racial and ethnic imbalance in urban public schools across the country – North and South – is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. . . . Economic pressures and voluntary preferences [footnote omitted] are the primary determinants of residential patterns." *Austin Independent School District v. United States*, No. 76-200, December 6, 1976 (Burger, Powell and Rehnquist, concurring) (hereinafter cited as *Austin*).

neighborhood school policy has determined how and where Milwaukee students are educated, including decisions on new school site selection, construction, school remodeling, school building additions, and actions taken to meet the increased crowding in the schools during the 1950's and early 1960's (A. 44).

Milwaukee school officials have been generally aware of residential racial concentration patterns since the 1950's and have understood that adherence to the neighborhood school policy would result in a number of schools with predominantly non-white student bodies (A. 102). Although school officials have considered certain systemic changes in an attempt to achieve more racially balanced schools (A. 102), they have refused to mandate greater racial balance through non-voluntary means because, *inter alia*, it would necessitate abandonment of the neighborhood school policy (A. 103).

C. Decision of the District Court

The District Court's conclusion that the Board intended to create and maintain a segregated school system is wholly inconsistent with its own specific findings of fact that:

> (1) "The Board has consistently and uniformly adhered to a 'neighborhood school policy,' first developed in 1919. The essence of that policy has been the assignment of students to schools within reasonable geographic distances of the students' residences. The policy has controlled the allocation of students among the schools in the system for attendance purposes. . . ." (A. 43).
>
> (2) "This central policy has been supported through the years by most Board members and has been of decisive importance in a host of decisions concerning how and where students were and will be educated, including decisions with respect to

new school site selection and construction, school remodeling, school building additions, and actions taken to meet the increased crowding in the schools during the 1950's and early 1960's." (A. 44).

(3) "Board and Administration determinations concerning site selection, building additions, school size, and district boundaries, among others, were made with the knowledge of their racial effect because there was general knowledge as to the racial characteristics of neighborhoods affected by such decisions. The evidence established that with respect to any such decision, alternatives were available which would have resulted in schools which are presently predominantly black having substantially lower proportions of their students nonwhite. *However, these alternatives were not consistent with the neighborhood school policy and, consequently, were not adopted.*" (A. 59) (emphasis added).

(4) "During the period, the Board's fundamental purpose was the maintenance and preservation of the neighborhood school policy. The Board knew that adherence to the neighborhood school policy would result in a high proportion of racially imbalanced schools but believed, in good faith, that such a policy would produce the best possible educational opportunities for all students in the system, regardless of race." (A. 102).

(5) "[E]ven Board members inclined toward affirmative action to attain racial goals agree that the majority Board members' views and decisions to the contrary were not motivated by any desire to discriminate against or otherwise 'shortchange' black students. To the contrary, the majority members had as their objective quality education

for all. From their point of view, quality education required adherence to the neighborhood school policy even though that policy necessitated the creation of segregated schools." (A. 107).

(6) "The gross imbalance in the city's racial residential patterns, superimposed upon the neighborhood school policy, has produced a number of schools which are predominantly white or predominantly black." (A. 110).

The District Court thus either mysteriously changed a uniform and consistent good faith adherence to a racially neutral neighborhood school policy for the educational benefit of all students into a premeditated intent to segregate, or held that the mere application of the policy was unconstitutional.

Additional District Court findings concerning the Board's teacher assignment policies, busing practices, boundary change and school siting decisions, and student transfer policies allegedly support its conclusion of constitutional violation. However, each of the cited practices and policies conformed to the neighborhood school policy, was racially neutral or, as in the case of the open transfer program, deviated from that policy at the specific request of the Milwaukee chapter of the NAACP.[5]

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5. The open transfer program was adopted to promote better racial balance, a result in fact accomplished in some schools. *See* pp. 28-29, *infra*.

Contrary to the allegation of lower educational quality and programs in schools with predominantly black populations, the District Court found that (a) substantially equal educational services were provided to all schools prior to the mid-1960's and (b) subsequent to that time

> "those schools serving the black areas of the city received a greater quantum of such services under the system's compensatory educational program." (A. 90).

D. **Decision of the Court of Appeals**

The Circuit Court's decision imposes an affirmative duty to achieve racial balance in each of the Milwaukee schools, even if it requires abandoning the Board's racially neutral neighborhood school policy.

In affirming the District Court's "conclusory findings of segregative intent" (A. 17), the Circuit Court applied a so-called and unusual "presumption of consistency" in conjunction with the "clearly erroneous" standard of review. The Circuit Court resorted to the "presumption of consistency" because of the "unexplained hiatus" between (a) the District Court's findings of the Board's good faith, consistent and uniform adherence to the neighborhood school policy and (b) its "conclusory findings" of intent to segregate:

> "Defendants here rely on the findings that they 'consistently and uniformly adhered' to a neighborhood school policy, 408 F.Supp. at 780, and that although 'with respect to any such decision, alternatives were available which would have resulted in schools which are presently predominantly black having substantially lower proportions of their students nonwhite, . . . these alternatives were not consistent with the neighborhood school policy and, consequently, were not adopted.' 408 F.Supp. at 788. These findings may be read as meaning that defendants hewed to their neighborhood school policy solely for racially neutral reasons and that the racial effects were not intended as such but were merely an unavoidable result; and, if so read, they cannot be said to be indicative of segregative intent. Here, as elsewhere, there is an unexplained hiatus between specific findings of fact and conclusory findings of segregative intent. The District Court is, however, entitled to a presumption of consistency,

> and we should, therefore, read the findings as elements of a presumably harmonious whole and interpret them as internally consistent when it is possible to do so. Reading the neighborhod-school-policy findings just referred to with the other findings, it is apparent that the former were not meant to describe all cases and that the court did not, as defendants contend, find that their challenged actions were entirely motivated by a racially neutral intent to adhere to a neighborhood school policy." (A. 17).

The result-oriented culmination of the Circuit Court's reconciliation of the findings and conclusion was, in effect, an arbitrary redefinition of "consistent and uniform" to mean "not all the time."

The Circuit Court also imposed an affirmative duty upon school officials to abandon the racially neutral neighborhood school policy to improve racial balance. Though it asserted that the Board failed to adopt programs which would have fostered integration "without violating the neighborhood school policy" (A. 18), it failed to identify even one of those programs. The only possibility alluded to by the Circuit Court was inconsistent with the neighborhood school policy. *See* pp. 23-25, *infra*.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUIT COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, INTENSIFIED A CONFLICT AMONG THE CIRCUITS AND MISAPPLIED APPLICABLE DECISIONS OF THIS COURT; BY INFERRING INTENT TO SEGREGATE, IT HAS MISTAKENLY RELIED UPON (A) BOARD DECISIONS WHICH ARE CONSISTENT WITH THE NEIGHBORHOOD SCHOOL POLICY, (B) RACIALLY NEUTRAL TEACHER ASSIGNMENT POLICIES AND (C)

AN OPEN TRANSFER PROGRAM ADOPTED TO ENHANCE RACIAL BALANCE.

The Circuit Court cast its decision as a routine affirmance of a district court. In fact, the Circuit Court decided two important and unsettled areas of federal constitutional law of overwhelming significance to the City of Milwaukee and the nation by holding that: (1) irrespective of segregative intent, a neighborhood school policy is unconstitutional *per se* if it results in school racial imbalance, and (2) irrespective of segregative intent, school officials have an affirmative duty to lessen racial imbalance in every school in their system.

This case, unlike any other to date,[6] is unique in providing the factual and legal foundation for a decision on the neighborhood school policy issue specifically reserved in *Keyes v. School District No. 1*, 413 U.S. 189, 212 (1973):

> "We have no occasion to consider in this case whether a 'neighborhood school policy' of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have committed acts constituting de jure segregation . . . by techniques that indicate that the 'neighborhood school' concept has not been maintained free of manipulation."

6. *United States v. Texas Education Agency*, 532 F.2d 380 (5th Cir. 1976), *cert. granted, vacated sub nom. Austin Independent School District v. United States*, No. 76-200, December 6, 1976, recently remanded to the Court of Appeals for the Fifth Circuit without opinion, is the only other recent decision presented to this Court which involved in any direct manner the neighborhood school policy question. However, the factual circumstances present in Austin, *e.g.* dual-overlapping attendance zones, *United States v. Texas Education Agency*, 467 F.2d 848, 867 (5th Cir. 1972), are totally absent here. The fact that this Court has dealt with a school desegregation decision so recently should not obstruct the granting of this petition. To permit the error of this case to continue uncorrected will render *Austin* equivocal.

In creating and applying a "presumption of consistency" in its affirmance, the Circuit Court attempted to hide what is plainly true – the District Court's conclusion of a constitutional violation is correct only if good faith adherence to a racially neutral neighborhood school policy is a *per se* constitutional violation. Intact bussing, boundary changes, school siting decisions and all other Board decisions, except one,[7] were in harmony with the neighborhood school policy. Alternative programs which the Circuit Court suggested should have been adopted are inconsistent with the neighborhood school policy and were rejected for that reason as specifically found by the District Court (A. 59).

A. The Circuit Court Decision Highlights a Conflict among the Circuits as to the Meaning of "Intent" under *Keyes*.

This Court's decision in *Keyes* held that proof of purpose or intent to segregate was one of three elements which must be shown to establish a constitutional violation.[8] 413 U.S. at 208. Lower courts have struggled with the application of "purpose or intent to segregate" since *Keyes* and the circuits are likewise in conflict over its proper interpretation.

The Second Circuit in *Hart v. Community School Board of Education*, 512 F.2d 37 (2d Cir. 1975), held that the foreseeable consequences of school officials' actions rather than a racial motivation test meets the *Keyes* intent requirement. The Fifth and Eighth Circuits, and a panel of

7. The exception, the open transfer program, adopted at the instance of the NAACP, is discussed at pp. 28-29 , *infra*.

8. *Keyes* established that *de jure* segregation exists only if (1) school officials administer the school system with acts or omissions "motivated by segregative intent," (2) which substantially cause (3) schools to be presently "segregated" in fact. 413 U.S. at 198, 201, 205-206, 208-209. *See* pp. 29-31 , *infra* for a discussion of the lower courts' misapplication of the *Keyes* "segregation" test.

the Sixth Circuit agree with this interpretation. *United States v. Texas Education Agency*, 532 F.2d 380 (5th Cir. 1976), *cert. granted, vacated sub nom. Austin Independent School District v. United States*, No. 76-200, December 6, 1976; *United States v. School District of Omaha*, 521 F.2d 530 (8th Cir. 1975), *cert. denied*, 423 U.S. 946 (1975); *Oliver v. Michigan State Board of Education*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

The Ninth Circuit disagrees; it has consistently held that racial motivation is required. *Berkelman v. San Francisco Unified School District*, 501 F.2d 1264 (9th Cir. 1974); *Johnson v. San Francisco Unified School District*, 500 F.2d 349 (9th Cir. 1974); *Soria v. Oxnard School District Board of Trustees*, 488 F.2d 579 (9th Cir. 1973), *cert. denied*, 416 U.S. 951 (1974). One panel of the Sixth Circuit also disagrees. *Higgins v. Board of Education*, 508 F.2d 779 (6th Cir. 1974).

This Court in a non-school case recently indicated that a racially discriminatory purpose, rather than statistical discriminatory impact, is required to establish a constitutional violation. Hence, the foreseeability test is inappropriate to establish segregatory intent. In *Washington v. Davis*, 426 U.S. 229, , 96 S.Ct. 2040, 2048 (1976), this Court said:

> "The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause."[9]

9. *See also Pasadena City Board of Education v. Spangler*, U.S. (1976), 44 U.S.L.W. 5114 (U.S. June 28, 1976), where it was held that a constitutional violation is not established by the existence of racially imbalanced schools resulting from shifts and racial concentration in housing patterns.

The Circuit Court was well aware of the problem of intent and referred to *Washington* in its decision (A. 13). However, the reference to racial motivation was rhetoric; in fact, its decision and that of the District Court make sense only if a foreseeability test was applied or the Milwaukee neighborhood school policy was unconstitutional *per se*. The effect of the decision, given its rationale and the findings both relied upon and ignored, constitutes a holding of *per se* malintent and unconstitutionality.[10]

B. The Circuit Court Has in Effect Overruled *Keyes* by Equating Segregative Intent with Adherence to a Neighborhood School Policy.

In reserving the neighborhood school policy question in *Keyes*, this Court stated that the manipulation of a neighborhood school policy so as to cause *de jure* segregation may be a constitutional violation. Here, there were no findings of "manipulation," but rather findings of a good faith adherence to a racially neutral neighborhood school policy. The Circuit Court *sub silentio* destroyed the *Keyes* intent test by holding that the requisite intent is present simply because the policy exists.

If the Circuit Court decision stands, school districts throughout the nation whose racially imbalanced schools

10. In *United States v. Texas Education Agency*, The Court of Appeals for the Fifth Circuit held:

> "[S]chool authorities may not constitutionally use a neighborhood assignment policy that creates segregated schools in a district with ethnically segregated residential patterns. A segregated school system is the foreseeable and inevitable result of such an assignment policy. When this policy is used, we may infer that the school authorities have acted with segregative intent." 532 F.2d at 392.

Whether by express language or implication, the result is equally erroneous. This Court's decision to grant certiorari and vacate the decision of the Court of Appeals for the Fifth Circuit indicates beyond a doubt the error of automatically equating neighborhood school policy adherence with segregative intent. *See Austin.*

result from a long-standing neighborhood school policy and relatively recent racial housing concentrations will be constitutionally required to abandon the policy. Such an affirmative obligation is also contrary to enacted Congressional policy and should be corrected by this Court so that state and local authorities are not misled.[11] *See* 20 U.S.C. Sections 1701, 1704 and 1705, pp. 4-5, *supra.*

C. The Courts Below Misinterpreted Additional Applicable Prior Law.

Keyes carefully preserved the holding of *Bell v. School City of Gary, Indiana,* 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964). The District Court's interpretation of *Bell* discloses the true essence of its decision and the Circuit Court's affirmance. *Bell* held that a neighborhood school policy, honestly and conscientiously constructed, with no intention or purpose to segregate the races, does not violate the Equal Protection Clause, even if the effect is to have racial imbalance in schools because residential areas are populated almost entirely by blacks or whites. It further held that there is no affirmative constitutional duty to change school attendance districts simply because shifts in population either increase or

11 The importance of the resolution of the issues here presented is disclosed by the decision of the District Court for the Northern District of California in *Diaz v. San Jose Unified School District,* 412 F.Supp. 310 (N.D. Cal. 1976), which is currently on appeal to the Court of Appeals for the Ninth Circuit, *appeal docketed,* No. 76-2148, 9th Cir., May 24, 1976. If the Circuit Court decision here is permitted to stand, and if the Ninth Circuit follows its prior decisions and affirms *Diaz* by holding that racial motivation is required to establish a constitutional violation, school officials will be faced with yet another conflict in the decisions of the circuit courts, for *Diaz* held that the consistent neutral adherence to a neighborhood school policy is not a constitutional violation, even if racially imbalanced schools result. 412 F.Supp. at 334.

decrease the percentages of black or white students in particular schools. 324 F.2d at 213.[12]

The District Court acknowledged the holding of *Bell,* but concluded that:

> "[A] 'neighborhood school system' would be beyond serious constitutional attack if, and only if, the schools in the system remained essentially the same with respect to most of the factors mentioned in *Keyes*, such as teachers, facilities, staff, and boundaries.
>
> * * *
>
> "But as soon as school officials start to make changes in school site locations, school sizes, school renovations and additions, school attendance zones, assignment and transfer options, transportation of students, assignments of faculty and staff, etc., their actions become . . . 'constitutionally suspect.'
>
> * * *
>
> "In Milwaukee, none of these decisions ever resulted in any significant or noticeable degree of desegregation in the school system, and practically all of them resulted in greater segregation." (A. 128-129).

The rapid student population changes of the fifties and sixties forced every large American school system, including

12. The principles expressed in *Bell* have been subsequently reaffirmed. *See, e.g., Milliken v. Bradley,* 418 U.S. 717, 740-741, 747, n.22 (1974); *Spencer v. Kugler,* 326 F.Supp. 1235, 1243 (D. N.J. 1971), *aff'd,* 404 U.S. 1027 (1972); *Lawlor v. Board of Education,* 458 F.2d 660, 662 (7th Cir. 1972), *cert. denied,* 413 U.S. 921 (1973).

the Gary, Indiana system challenged in *Bell*, to undertake new school construction, change faculty assignments and adopt temporary measures in response to overcrowding. 324 F.2d 211-212. Under the District Court's restrictive interpretation of *Bell*, the neighborhood school policy of each of those systems is "constitutionally suspect."

The fact that racial balance did not result from Board decisions consistent with the neighborhood school policy does not prove that the Board acted with an intent to segregate.[13] Site selection, boundary changes and other similar decisions which are consistent with a neighborhood school policy but do not eliminate racial imbalance are evidence of segregative intent only if adherence to the underlying policy is *per se* evidence of that intent. If that is so, all neighborhood school policies in cities with racially concentrated housing patterns are unconstitutional. Such a decision emasculates the distinction between *de jure* and *de facto* segregation which was preserved in *Keyes*.[14]

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13. In *Diaz v. San Jose Unified School District*, 412 F.Supp. 310 (N.D. Cal. 1976), the court made findings amazingly similar to those made by the District Court here, and concluded that segregative intent had not been shown. After reviewing site decisions and school construction decisions, boundary assignment practices and the board's failure to take affirmative steps to "integrate," the court stated:

> "The court finds that the district has consistently adhered to a neighborhood school policy. The board has applied this policy neutrally: the record discloses no attempts to gerrymander attendance boundaries or otherwise manipulate attendance areas to lock in minorities or freeze segregated school patterns.
>
> . . .
>
> "The court may disagree with the policy of the board in pursuing other educational goals over improved ethnic balance. If, however, neutral adherence to a neighborhood school policy is constitutional, this court has no authority to intervene and order integration." 412 F.Supp. at 334.

14. Mr. Justice Powell would have abolished the distinction

(Footnote continued)

D. This Petition Should Be Granted because the Circuit Court Mistakenly Inferred Segregative Intent from: (a) Board Decisions Consistent with the Neighborhood School Policy, (b) Racially Neutral Teacher Assignment Policies and (c) an Open Transfer Program Adopted to Enhance Racial Balance.

1. ***Boundary changes conformed to the neighborhood school policy.***

The District Court found that: (1) the Milwaukee Board adhered to the neighborhood school policy uniformly and consistently (A. 43); (2) the essence of this policy has been the assignment of students to schools within reasonable geographic distances of their residences, with attendance zone radii based upon numerous practical (non-racial) criteria (A. 43); (3) the policy has controlled the allocation of students among the schools for attendance purposes (A. 43) and alternatives inconsistent with this policy were rejected for that reason (A. 59); (4) this policy has been of decisive importance in deciding how and where students were and will be educated (A. 44); (5) boundary changes were primarily made to meet increasing or shifting student populations or changing school capacities (A. 47-48); (6) the boundary changes transferred pupils from overcrowded schools to adjacent schools having available space so as to avoid, in the face of population shifts, overcrowding or under-utilization of buildings (A. 48); and (7) there was no direct relationship between the student body racial percentages of the receiving and losing school affected by boundary changes (A. 49).

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between *de jure* and *de facto* segregation. *Keyes*, 413 U.S. at 224. He would have further limited the scope of remedial steps so as to include a concern for "legitimate community and individual interests in framing equitable decrees." *Id.* at 253. He advocated that a "more flexible and reasonable" remedial standard be applied. *Id.* While district courts have relied upon Mr. Justice Powell's concern about proof problems under the varying standards for southern and northern cases, his statements on remedy have been for the most part ignored. This problem will hopefully be alleviated in light of the concurring opinion of Justices Burger, Powell and Rehnquist in *Austin*.

The District Court further found that the basic policy with regard to boundary changes was to act consistently with the underlying commitment to the neighborhood school policy (A. 48). Indeed, the Board refused to undertake "domino" type boundary changes precisely because they would have been inconsistent with that policy (A. 49).[15] The pattern and practice was a resolute application of neutral criteria. These findings preclude any possible inference of segregative intent.

Nevertheless, the Circuit Court sustained the conclusion of segregative intent by relying upon an unsupportable finding of the District Court based on a study of 63 boundary changes which were made between 1950 and 1968. The conclusions, contained in Exhibit 374, were based upon information orally collected piecemeal by the plaintiffs' chief witness from unidentified persons as to racial composition of various city blocks many years prior to the date upon which the data was collected. Only schools which had student bodies more than 50 percent black as of 1967-1968 were involved – there was no comprehensive analysis of all boundary changes during the time period in question.

Even if one were to assume that the study has some validity and probative value, the District Court found that only 29 of the 63 (46%) boundary changes arbitrarily selected for study over an 18-year period increased the concentration of black students (A. 4, 112). Approximately 44 percent of the boundary changes had no effect on the concentration of black students. Hence, it was improper for the Circuit Court to infer segregative intent even from this unreliable boundary change study.

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15. "Domino" type boundary changes would involve a series of boundary changes in three or more contiguous districts ultimately placing students in the most distant school in the series (A. 49). "This was rejected because it was incompatible with the neighborhood school policy and would ultimately compel children to attend schools far from their homes." (A. 49).

Aside from study unreliability, both the District and Circuit Courts ignored the fact that the evidence conclusively shows the Board was completely unaware of the racial makeup of blocks involved in boundary changes. Block by block racial statistics were not available, considered or used by school personnel. Even if the casually collected statistics of Exhibit 374 have probative value, no basis exists for concluding boundary change decisions were motivated by intent to segregate or even were made with knowledge of racial consequences.

Racial imbalance in neighborhood schools followed closely upon black residential concentration. The fact that Milwaukee's boundary changes did not eliminate racial imbalance does not prove segregative intent. Racial balance could have been achieved only if the Board had abandoned its neighborhood school policy in response to the overcrowding and expansion problems which it faced during the 1950's and 1960's.

As student population density increased, boundary changes were needed to prevent overcrowding. Such changes were made by contracting attendance zones in conformity with neighborhood school policy principles. If a negative inference is drawn from these facts, the neighborhood school policy is *per se* unconstitutional.

Although the Circuit Court held that the Board consistently failed to choose policy options which would enhance racial balance "without violating the neighborhood school policy" (A. 18), it did not identify any options consistent with that policy. Rather, the Circuit Court suggested boundary change options *inconsistent* with the neighborhood school policy.

In footnote 15 to its opinion, the Circuit Court discussed a boundary change example involving Walnut and Center Street Schools (A. 18). The example incorrectly assumed that those schools were overcrowded and then

stated that the Board had at least three options in making required boundary changes:

> "[T]hey could have transferred only a few blocks closest to the white school to that school, even though those blocks were predominantly white; they could have transferred those blocks and additional blocks containing black students, assuming we are right in concluding that there was room to accommodate additional students; or if we are wrong about that, they could have transferred blocks containing blacks instead of blocks containing whites." (A. 18, n. 15).

In clear conformity with the neighborhood school policy, the Board adopted the first option. The second option assumes, without justification, that there was room in the "receiving" school to accommodate additional students. Even if this were true, there was no necessity to transfer additional blocks. The overcrowding problem was alleviated by shifting the blocks closest to the transferee school. The Circuit Court suggestion is the imposition of an affirmative duty to promote racial balance at the expense of a neighborhood school policy. This is not the law.

The third option required blatant gerrymandering since blocks closest to the school would have been passed over in order to include more distant blocks with a higher black population. At no time did the Board engage in such gerrymandering for *any* reasons.

The option adopted by the Board for the Walnut and Center Street Schools was the option consistent with the neighborhood school policy. The suggestion that an acceptable alternative was to transfer blocks further away because such transfer would improve racial balance discloses that the Circuit Court is rejecting the neighborhood school policy, and is requiring that school officials change that policy to pursue racial balance.

The Board's discretion in applying its neighborhood school policy does not support an inferential conclusion of segregative intent. The Circuit Court, without factual foundation, mistakenly assumed the existence of options consistent with both the neighborhood school policy and increased racial balance.

2. ***Intact busing is a natural extension of the neighborhood school concept.***

The Circuit Court inferred segregative intent from, *inter alia*, so-called "intact busing" (A. 16) of classes temporarily displaced from their neighborhood school by overcrowding or remodeling.[16] In instances of classroom shortage, the class and its teacher went from their neighborhood school to a school having an available classroom, usually for one semester or less for remodeling or one year for overcrowding (A. 7, 8, 61, 62). A large number of white students were bused by the intact method (A. 65-66). Indeed, the initial use of such busing involved white students in the early 1950's prior to overcrowding in predominantly black schools. The intact practice continued to involve white students until it was no longer used.

Intact busing is a temporary measure which is consistent with the neighborhood school concept. It has educational, administrative, efficiency and economic advantages (A. 61-62), and it permitted the bused students and their teachers to continue to identify with the neighborhood schools to which they would return after the short term overcrowding was corrected or remodeling completed (often in mid-semester). Placing the students into multiple classes at the "receiving" school and reassigning them to their

16. "Intact busing" is a misnomer because it implies a complete separation of students. In Milwaukee, students bused by the intact method mixed with receiving school students during recess periods, lunch programs and school assemblies. This was specifically found by the District Court (A. 61), but ignored by the Circuit Court. Such practices are hardly indicative of a segregative motive.

neighborhood school shortly thereafter would have caused needless trauma. Further, in pure overcrowding instances, such actions would have severed the students' connection with their neighborhood schools. To infer intent from the intact busing policy, with its obvious history, purpose and application without regard to race, is inappropriate.

It is illogical to conclude as did the Circuit Court (A. 16), that intact busing is evidence of segregative intent simply because in one case it was called one of the "commonly used or classic segregative techniques." *Higgins v. Board of Education*, 508 F.2d 779, 787 (6th Cir. 1974). Such arbitrary classification bypasses the intent to segregate requirement, for an adverse inference, regardless of motivation or purpose, could be drawn whenever the policy was used. The Circuit Court's statement discloses a misunderstanding of the *Keyes-Washington* intent standard and illustrates its generally simplistic approach in reviewing the District Court decision.

The Circuit Court also based its inference of segregative intent upon those exceptional instances where intact busing was used for more than a few semesters. The Circuit Court relied upon the District Court finding that those exceptions involved "elementary schools which tended to be predominantly black" (A. 8, 64). The inference is unwarranted. There is no finding or evidence that the same students at the same grade levels were bused over extended periods of time and no finding or evidence that the sending schools either transported students to the same receiving schools each year or that there was space available in the same receiving schools. The absence of such findings or evidence discloses that an alternative method of busing would not have been viable. Further, four of the sixteen schools (25%) involved in intact busing for more than a few semesters were predominantly white schools.

3. The Board's racially neutral teacher assignment policies were required by non-racial circumstances beyond the Board's control and do not evidence segregative intent.

The Circuit Court concluded that the Board must "bear some part of the responsibility for the teacher imbalance," (A. 10) because "[i]t could . . . have been inferred that teacher assignments not governed by the collective bargaining agreement were not made in accordance with racially neutral principles." (A. 17). This conclusion was apparently premised in large part upon testimony not relied upon by the District Court in making a finding concerning teacher assignment. The Circuit Court overlooked the contrary testimony of a Board employee responsible for teacher staffing whose testimony *was* incorporated into a finding (A. 75). Further, even the Circuit Court acknowledged that "the primary cause of the racial imbalance was the priority given under the collective bargaining agreement to transfer requests by teachers with seniority. . . ." (A. 10), and the District Court found that the "agreements have generally barred involuntary reassignments" (A. 77). When the Board attempted to regain some of their reassignment rights, the "teachers would have struck to prevent insertion of such provisions in the contract" (A. 77).

In addition, thy Circuit Court ignored the importance of the following findings:

(1) Teachers, black and white, were in short supply in early and mid-1960's (A. 72);

(2) Since at least the early 1960's, heavy emphasis has been placed on recruiting minority teachers, principals and administrators; this program was only moderately successful due both to a shortage of those teachers and the great demand for them (A. 72-73);

(3) Significant progress in the recruitment program has occurred in recent years as a result of increasing numbers of black teachers (A. 73-74);

(4) The scarcity of qualified teachers required the Board generally to honor teachers' personal needs and desires concerning initial assignment (A. 76);

(5) The Board attempted to persuade teachers not to transfer out of schools when this would harm faculty racial balance (A. 77); and

(6) "There has never been any effort to keep black teachers from teaching in predominantly white schools." (A. 79).

Given these specific findings and the Circuit Court's arbitrary reliance on the testimony of one Board member which was not made a finding of fact, the Circuit Court's inference that teacher assignments evidenced segregative intent is without foundation.

4. ***The open transfer policy was adopted at NAACP urging and caused improved racial balance in some schools and greater imbalance in others. It does not evidence segregative intent.***

The Circuit Court also inferred segregative intent from the Board's adoption and maintenance of an open transfer policy (A. 16). This program permitted students upon request to transfer from their neighborhood school to any Milwaukee school with available space, on a first come, first serve basis. The policy was adopted in 1964 at the request of the National Association for the Advancement of Colored People (NAACP) and a black member of the Board, Mr. Golightly (A. 8, 67, 68), in the hope of enhancing "racial integration" (A. 68). The Circuit Court recognized that the policy was adopted for a proper purpose, and further noted

that it had a "mixed racial impact" (A. 9).

The District Court improperly concluded that the open transfer policy was a substantial cause of segregation even though there were only "eight instances in which the transfer policy substantially affected an elementary or secondary school's racial composition" (A. 9). Its conclusion is based upon a 1972 study of the effects of open transfers on racial balance. The study also discloses that student body racial percentages at 53 of the system's approximately 160 schools (33%) were *improved* by the use of open transfers. Both the District and Circuit Courts acted improperly in inferring segregative intent from an open transfer policy which (a) was adopted at the request of the NAACP to enhance "racial integration," (b) adversely affected racial balance in only 5% of the system's schools, and (c) had a positive racial balance effect at 33% of the schools.

Finally, as there is no evidence that the Board knew that the open transfer policy was affecting racial imbalance in any school until the 1972 study was released, and the resulting imbalance did not affect the system as a whole, its maintenance is an insufficient basis from which to infer segregative intent. Through hindsight, the Board has been condemned for an action initially adopted to, and which in fact did, enhance racial balance. Both the condemnation and the inference are unsupported.

II. THE CIRCUIT COURT IGNORED THE MEANING OF SEGREGATION ADOPTED IN *KEYES* BY EQUATING RACIAL IMBALANCE WITH SEGREGATION AND REQUIRED INORDINATE REMEDIAL ACTION.

A further reason for this Court to issue a writ of certiorari is a need to clarify the standard for proving "segregation." To prove segregation, the following factors are to be considered:

> "In addition to the racial and ethnic composition of a school's student body, other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitude towards the school, *must be taken into consideration*." *Keyes*, 413 U.S. at 196 (emphasis supplied).

The District Court did not find any school to be "segregated" as defined in *Keyes*. Contrary to the *Keyes* directive, both Courts relied solely upon statistical evidence in concluding that segregation existed. The Circuit Court stated:

> "The statistical evidence, without more, shows that the system is in substantial part segregated in fact." (A. 12).

This departure from *Keyes* is exacerbated by the Circuit Court's conclusion that the system is "*in substantial part* segregated in fact," despite the District Court's remedial requirement that the system *as a whole* must be desegregated (emphasis added). There is no judicial power to remedy that which does not violate the Constitution. The conclusion that some schools are segregated does not justify a similar conclusion as to all schools, and certainly does not support a remedial decree which requires a racial quota at every school.[17]

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17. The District Court ordered that all schools in the system shall have student populations between 25% to 45% black, with one-third of the schools to reach this goal by September of 1976, and the middle and final thirds to meet the required percentages, respectively, by September of 1977 and 1978 (A. 143-144).

The following comment from the concurring opinion in *Austin* is equally applicable here:

> "[T]he remedy ordered appears to exceed that necessary to eliminate the effect of any official acts or omissions. The Court of Appeals did not find and there is no evidence in

(Footnote continued)

As stated in *Brown v. Board of Education*, 349 U.S. 294, 300 (1954): "[i]n fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles." The finding of a violation in one portion of a school system does not permit an equity court to order its perception of an ideal remedy in all schools. While there is broad power to remedy past wrongs, and to correct the condition that offends the Constitution, "the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). Congress has also indicated that the remedy must be limited to the violation. *See* 20 U.S.C. Section 1712, p. 5, *supra*.

III. THE PRESUMPTION OF CONSISTENCY ARBITRARILY REJECTS DISTRICT COURT FINDINGS WHICH MANDATE A LEGAL RESULT CONTRARY TO THAT REACHED BY THE DISTRICT COURT.

The Circuit Court resolved the dilemma of an "unexplained hiatus" between the District Court's "specific findings of fact" and its "conclusory findings of segregative intent" (A. 17) by creating a "presumption of consistency."[18] *See* pp. 12-13, *supra*, (A. 17). In so doing, the Circuit Court conveniently dissolved findings of fact requiring a reversal. It thus preempted the District Court's role as the trier of fact.

Through the "presumption of consistency," the Circuit Court ignored the key finding of the District Court that the

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> the record available to us to suggest that, absent those constitutional violations, the Austin school system would have been integrated to the extent contemplated by the plan.
>
> . . .
>
> "Thus, large-scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past."

18. Counsel for petitioners were unable to find a single instance

(Footnote continued)

Board had "uniformly" and "consistently" adhered to the neighborhood school policy. The word "uniform" is defined as "marked by complete conformity to a rule or pattern or by similarity in salient detail or practice," and the word "consistent" is defined as "marked by harmony, regularity, or steady continuity throughout: showing no significant change, uneveness, or contradiction." Webster's New International Dictionary (3d ed.). The decision making process employed by the Circuit Court repudiates the District Court's language by concluding that "consistently" and "uniformly" do not mean what they say.

If a presumption of consistency is proper in an appellate review context, it must be used to harmonize the inconsistencies. Here, in the guise of harmonizing, the Circuit Court in fact negated a specific District Court finding, for there was no way to harmonize that finding with the conclusion of segregative intent.

The "presumption of consistency" has no foundation in the law, and, in the context here employed, with good reason. If such appellate court practice was permitted, courts would have unfettered discretion to reach a desired result without constraint by findings inconsistent with that result. The presumption improperly insulates from meaningful appellate review erroneous district court conclusions. The Circuit Court "has so far departed from the accepted and usual course of judicial proceedings . . . [that] an exercise of this court's power of supervision [is called for]." Supreme Court Rule 19.

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where an appellate court has relied upon the device created by the Circuit Court.

IV. THE APPLICATION OF THE CLEARLY ERRONEOUS STANDARD OF REVIEW TO ULTIMATE AND CONCLUSORY FINDINGS IS IN CONFLICT WITH THE RULE IN OTHER CIRCUITS AND SHOULD BE OVERRULED HERE.

In affirming the District Court's "conclusory findings of segregative intent" (A. 17), the Circuit Court improperly applied the "clearly erroneous" standard of review.[19] Its use of that standard conflicts with decisions of other circuits concerning the appropriate standard of review of ultimate and conclusory findings based upon inferences from basic facts. Among such holdings are the following:

> *Joseph Lupowitz Sons, Inc. v. Commissioner of Internal Revenue*, 497 F.2d 862, 865 (3d Cir. 1974);
>
> *Hester v. Southern Railway Co.*, 497 F.2d 1374, 1381 (5th Cir. 1974);
>
> *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 423 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972);
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> *Philber Equipment Corp. v. Commissioner of Internal Revenue*, 237 F.2d 129, 131 (3d Cir. 1956).

As stated in *Lupowitz:*

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19. District Court factual findings may not be set aside unless they are "clearly erroneous," i.e. unless upon reviewing all of the evidence the appellate court is "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

> "[Appellant] challenges not the basic facts found . . . but its ultimate finding of fact, [footnote omitted] which represents an inference drawn from the basic facts. It is settled that *such an ultimate finding is reviewable as an issue of law and is not subject to the clearly erroneous rule.*" 497 F.2d at 865 (emphasis added).

The Circuit Court's reliance on *United States v. Board of School Commissioners*, 474 F.2d 81 (7th Cir. 1973), *cert. denied*, 413 U.S. 920 (1973) for the proposition that the "clearly erroneous" test was the appropriate one is in error, for the proper standard of appellate review of ultimate and conclusory findings based upon inferences from basic facts was apparently neither briefed nor considered therein. This Court should correct the Circuit Court's misapprehension of the law and the resultant conflict between circuits.

V. A DISTRICT COURT'S URGENT IMPOSITION OF REMEDY SHOULD NOT DENY APPEAL RIGHTS.

This action was commenced in 1965, tried in late 1973 and early 1974 and decided in January of 1976. Notwithstanding this lengthy history, the District Court demanded the fashioning of an immediate remedy, and the Circuit Court refused to stay remedial action.[20]

The deprivation of more than cursory appellate review in cases like the instant one by imposing immediate relief should not be condoned. Meaningful appeal is denied if limited in any way because a remedy is in process.[21] This

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20. Application for a stay was filed on May 13, 1976, and denied on May 20, 1976.

21. It may have been for just such reason that Congress in adopting 20 U.S.C. Section 1752, p. 5 , *supra*, provided that district court orders requiring the transportation of students for racial balance purposes shall be postponed until appeal rights have been exhausted.

Court should review this case on the merits even though the District Court forced initial implementation before the processing of timely appeal procedures. Unlike the experience in some American cities, Milwaukee school officials have peacefully commenced restructuring their school system under court supervision. If anything, their respect for the law is even more reason for an in-depth review of the Circuit Court's decision.

Prior to the District Court's decision on liability, the Board initiated development of a voluntary integration program based upon educational incentives. The Board adopted a "Statement on Education and Human Rights" on September 2, 1975. Since the first phase of the remedial program approved by the District Court was primarily based upon the voluntary educational incentive program which the Board had adopted prior to decision, a reversal of the Circuit Court decision will have little effect on Milwaukee's present programs.

CONCLUSION

Recent American history makes clear that a federal court conclusion of unconstitutional public school segregation must be based on clear and specific consistent findings. The District Court's conclusion of segregative intent in the instant case does not meet that test. Even a brief reading of the District Court's findings of fact reveals that the racial imbalance in the Milwaukee Public Schools resulted solely from the Board's good faith adherence to a racially neutral neighborhood school policy and non-governmentally caused racial residential concentration. As a matter of law, this cannot constitute the requisite intent to segregate unless a racially neutral neighborhood school policy which results in some racial imbalance is *per se* unconstitutional.

Nevertheless, relying on an improper standard of review and a novel concept called a "presumption of consistency," the Circuit Court affirmed the District Court's ultimate conclusory finding of segregative intent. Even if a

"presumption of consistency" is appropriate in some cases decided by a district court, it has no place in a case where the judicial branch takes continuing jurisdiction of and extensively restructures a public school system. Public confidence in the even-handedness of the appellate process in a case of such far-reaching social consequences requires something more substantial than appellate presumptions and reliance on only selected portions of the record and selected lower court findings of basic facts.

The relationship of Milwaukee residents to their neighborhood schools traditionally has been a great source of stability and strength for the City. In a time of increasing citizen alienation from government at all levels, the forced dismantling of neighborhood school relationships by the federal judiciary should be undertaken only in the clearest of cases.

For economic and educational reasons, the neighborhood school policy dominates school districts throughout the nation. If the policy is unconstitutional *per se* because of non-governmentally caused racial residential concentration, let the word go forth immediately. Conversely, if the policy is constitutional in such a context, that too should be declared.

Petitioners pray that a Writ of Certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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December 14, 1976.

APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-809

THOMAS BRENNAN, et al.,

Petitioners,

v.

KEVIN ARMSTRONG, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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INDEX OF APPENDIX

Kevin ARMSTRONG,* a minor,
by Roosevelt Savage and Rochelle
Savage, his parents and next
friends, et al.,

Plaintiffs-Appellees,

v.

Thomas BRENNAN et al.,

Defendants-Appellants.

No. 76–1130.

**United States Court of Appeals,
Seventh Circuit.**

Argued June 2, 1976.

Decided July 23, 1976.

**Rehearing and Rehearing En Banc Denied
September 22, 1976.**

Before TONE and WOOD, Circuit Judges, and GRANT, Senior District Judge.**

TONE, Circuit Judge.

Before us on this interlocutory appeal is the District Court's ruling that the Board of School Directors of the City of Milwaukee and its members "have knowingly carried out a systematic program of segregation affecting all of the city's students, teachers, and school facilities, and have intentionally brought about and maintained a dual school system." *Amos v. Board of School Directors of the City of Milwaukee*, 408 F.Supp. 765, 821 (E.D. Wis. 1976).

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* In the District Court the first named plaintiff was Craig Amos, who has since been dismissed from the action.

** The Honorable Robert A. Grant, Senior District Judge of the Northern District of Indiana, is sitting by designation.

The plaintiffs are five black children, representing a class of all blacks who are or will be enrolled in the Milwaukee public schools, and three nonblack children, representing a similar class of nonblacks.[1] Also appearing before us in support of affirmance is the Wisconsin Civil Liberties Union as *amicus curiae*. Defendants are the individual members of the school board, the superintendent of schools, and the board's secretary-business manager.[2] In the order appealed from, they have been enjoined from future acts of segregation, and a special master has been appointed to assist in fashioning further relief. We have jurisdiction under 28 U.S.C. Section 1292(a)(1), because the interlocutory order appealed from grants an injunction. To insure appealability, the District Court also certified the case under 28 U.S.C. Section 1292(b) as appropriate for interlocutory review, 408 F.Supp. at 825, and we permitted the appeal to be taken upon application made within ten days. We affirm the District Court's order.

I. Overview of the Milwaukee School System and Its Operation

The Milwaukee public school system, the territory of which is coterminous with that of the City of Milwaukee, is one of the 15 largest school systems in the country. Since 1950, it has grown rapidly geographically, and in both total enrollment and black enrollment.[3] Thirty-five percent of the

1 Twenty-seven other persons, including Craig Amos, who was the first-named plaintiff in the District Court, were named as individual plaintiffs, but by the time of the District Court's ruling on the merits, they had left the school system or at least were not known to be students there. They were therefore dismissed from the action. 408 F.Supp. at 776.

2 The Board itself was dismissed as a defendant for want of jurisdiction. 408 F.Supp. at 777.

3 Geographic expansion occurred as the city annexed outlying areas, nearly doubling the system's territory between 1950 and 1960. Between 1950 and 1972, enrollment rose from 67,000 pupils to 128,000. The growth in the number of black pupils has been even more dramatic and is the result of the quintupling of the city's black population between 1950 and 1970, rising from 22,000 (3½ percent of the total population) in 1950, to 62,000 (8½ percent) in 1960, and then to 105,000 (14¼ percent) in 1970. See 408 F.Supp. at 779.

system's students are now black. In 1972-1973, 71 elementary schools had student bodies at least 90 percent white, 23 were at least 90 percent black, and 27 were in between.[4] In the same school year (the year before trial), some 80 percent of the city's black students attended majority black schools and over three quarters attended schools that were 80 percent or more black.

As in many cities, in Milwaukee the black population is concentrated in a central area, called "the core" by the parties. The core contained about 90 percent of the city's blacks in 1970, with the percentage of blacks ranging from 75-80 percent in the center of the core to 40 percent on the periphery. The District Court found that "[s]ubstantial numbers of blacks and whites have seldom resided in the same neighborhood or attended the same schools for a substantial period of time." 408 F.Supp. at 812. Once blacks comprise about 30 percent of the population of a neighborhood or a school, "white flight" generally begins, and whites leave in large numbers. The rate varies but the process is seldom reversed. *Id.*

Student population in the core area has grown rapidly, creating serious problems for the school system. Generally, schools there became overcrowded as older white residents were replaced by younger black families with children. When overcrowding was thought to be temporary, defendants converted into classrooms space in school buildings that had been used for other purposes, such as basement rooms, auditoriums, and gyms. In addition, they attempted to find vacant classrooms in nearby schools and moved students to those schools through busing, redistricting, or transferring

4 The following table indicates the number of schools with various percentages of black students (see 408 F.Supp. at 811):

	0-10%	10-33%	33-67%	67-90%	90-100%
Elementary Schools	71	17	5	5	23
Junior High Schools	10	3	–	2	4
Senior High School	8	1	3	1	2

grades (*e.g.*, moving the entire ninth grade from a junior high school to a senior high school). If the crowding was thought to be long-term, the solutions included building an addition to an existing building, renting private school facilities, reopening an unused school building, and building a new school. *Id.* at 782. In making these and other decisions, defendants were guided by their neighborhood school policy. The goal was to assign students to schools within walking distance of their homes, in order to foster a close relationship between community and school, maximize convenience for students and their families, and minimize compartmentalization of the student's life between home and school. *Id.* at 780-781.

With this background in mind, we turn to a consideration of the actions alleged to be part of a pattern of deliberate segregation.

II. Acts of the Defendants Having Segregative Effects

A. *Boundary Changes and School Siting*

The District Court found that the effect of school boundary changes from 1950-1968

> "was to increase the degree of racial imbalance in these schools. Of the 63 boundary changes, 29 increased the concentration of black students in ghetto schools. In one case it resulted in a number of black students attending a white school for the first time. Twenty-eight changes had no effect because there were no differences in the racial makeup of the losing school or the gaining school. In five cases the results were inconclusive as they affected schools that differed in their racial makeup, although in five cases majority black schools were involved." 408 F.Supp. at 813.

We cannot say this finding was clearly erroneous. It was based on a study by plaintiffs' expert, Dr. Robert P. Stuckert, in which he tabulated the racial composition of city blocks transferred in each boundary change between 1950 and 1968 as the changes affected schools that were 50 percent black by the 1968-1969 school year. Dr. Stuckert calculated that in 22 boundary changes affecting these schools, the percentage of black residents in the group of blocks transferred was lower than the percentage of black pupils in the "losing" school from which they were transferred. In each case, they were transferred to "gaining" schools that also had fewer blacks than the losing school. In other words, comparatively white blocks were in these instances shifted from black schools to white schools, or at least to schools with fewer blacks. In eight other instances, the percentage of black residents in the group of blocks transferred was higher than the percentage of black pupils in the losing school; in seven of these cases the gaining school had a lower percentage of whites. In sum, blocks with racial characteristics different from the losing school were shifted to schools with racial characteristics more like those of the transferred blocks.

Defendants argue that the District Court did not consider the racial impact on the "gaining" school. Although that court's opinion does not discuss this aspect of the transfers, it appears to us that over two thirds of them had a neutral effect on the gaining school, and, as for the rest, the integrative gains in some gaining schools are balanced by integrative losses in others. Thus, the effect on the gaining schools did not offset the adverse impact on the losing schools, and the net effect of the transfers was to increase racial imbalance.

Defendants also argue that Dr. Stuckert used an unreliable method to determine the racial composition of the blocks. For transfers during, immediately preceding, or immediately after a census year, block data from the census

were used. For transfers during the period between the 1960 and 1970 censuses, data were obtained by interviewing people who had lived or worked in the area at the time of the boundary change, who were asked to estimate the racial composition of the blocks. The interviewing was done by Dr. Stuckert's assistants, for the most part over the period 1967-1969. Where possible, these estimates were checked against estimates by other people and against later census data (on the assumption that the percentage of blacks increased with the passage of time). Interviewees were generally not asked about a block's racial composition before 1960, since the 1960 census showed most of the blocks previously involved in boundary changes to have been all-white. Thus, estimates were primarily relied on for the period from 1962 to 1968. The information was not otherwise available.

Defendants do not object to the data based on interviews as hearsay,[5] but they argue that this evidence was so unreliable that it should have been given no credence. Dr. Stuckert testified that this was a "standard procedure in many kinds of social scientific research" whenever there is no other way to obtain the data, and at oral argument in this court counsel for defendants was unable to suggest any better procedure for obtaining the necessary information. The evidence was not so unrealiable that the district judge abused his discretion in receiving it and considering it.[6]

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5 We therefore need not consider the applicability of Rule 803(24), Fed.R.Evid., or the effect of the failure of plaintiffs to observe the notice procedure provided in that rule.

6 A third attack, made in a footnote in defendants' reply brief, is that the block data gave the percentages of black residents rather than the percentage of black pupils. This appears to be the case, although at oral argument in this court counsel for defendants described the method used as talking to people "to find out how many black children and how many white children they thought lived on the block ten years ago." Dr. Stuckert testified that the discrepancy between pupil and residential populations was slight except in areas "that were over 50 or 67 percent black." About 46 percent of the boundary changes affected blocks containing 67 percent or more blacks. Correcting the claimed error would produce an increase in the percentage of black school children assumed to reside in those heavily black areas. This would not destroy the overall validity of the estimates or the conclusions based thereon.

The District Court further found that "the Board's consistent response [to overcrowding] was the restriction or 'compression' of boundary lines, often accompanied by an expansion of facility capacity through such techniques as the building of additions and the utilization of substandard classrooms," and that this had the effect of keeping the concentrated black student population from spreading to the rest of the city and "increased the concentration of black pupils in Central City schools and the degree of racial imbalance in the system as a whole." 408 F.Supp. at 784. The court also found that

> "[t]he disproportionate use of substandard classrooms in the black schools resulted in concentrating black students at times when the use of facilities at nearby white schools would have resulted in an appreciable degree of race mixture at these white schools." 408 F.Supp. at 813.

We have concluded from our examination of the record that these findings were not clearly erroneous.

B. *Busing*

Defendants practiced two types of busing. "Mixed" busing, under which the transferred students were added to the receiving school's roster and treated like other students, was used when the students were to be assigned to the receiving school on a permanent or indefinite basis, usually because there was no school within walking distance or there were walking safety hazards. The students for whom this method was used were usually white.

The other kind of busing, called "intact" busing, consisted of busing teacher and class intact. It was used when the busing was being carried out because of overcrowding or modernization work on buildings. In many instances students bused "intact" were returned to their own schools for lunch.

The classroom in the new school became, in effect, an extension of the old school. 408 F.Supp. at 789. The reason given for the use of the intact method of busing in the overcrowding or facilities-modernization situations was that it generally lasted for a relatively short time and prevented the disruptions that would have resulted from mixed busing for short periods. Busing for overcrowding generally, and busing for facilities-modernization invariably, lasted only a few semesters, but the exceptions, according to the District Court, involved "elementary schools which tended to be predominantly black." 408 F.Supp. at 790. From 1958 to 1974, there were 509 instances of intact busing, of which 214 were between schools with substantially the same racial compositions, 6 were to special schools, 9 were to schools with substantially larger black populations, and 280 were to schools with substantially smaller black populations. 408 F.Supp. at 788-791.[7] In 1971, the board eliminated intact busing for periods greater than a year. 408 F.Supp. at 791.

C. *Open Transfers*

Until 1964, students could voluntarily transfer between schools only if school administrators found the stated reason for the transfer to be valid. Following a request by the National Association for the Advancement of Colored People, and with the sponsorbhip of minority Board members, defendants adopted an "open transfer" policy under which students could transfer to any school with a vacancy, without giving any reason for the transfer. By the 1972-1973 school year, there were 4,327 applications for transfers, of which 81 percent were granted. The total number of students attending schools outside their own attendance zones was much greater than this, because transfer requests granted in previous years did not have to be renewed. 408 F.Supp. at 793.

7 Defendants point out that there was no direct evidence of the racial composition of the bused students, but it is reasonable to assume that it would normally be about the same as that of the schools from which the students were bused.

The open transfer policy had a mixed racial impact. It enabled blacks to transfer into white schools, which appears to have been its original purpose, but also allowed whites to transfer out of black or racially mixed schools. The District Court found eight instances in which the transfer policy substantially affected an elementary or secondary school's racial composition. A study conducted by defendants indicated that the transfer policy caused the percentage of black pupils at seven secondary schools to rise by amounts ranging from 5 percent to 24 percent.[8] The overall effect upon elementary schools was less significant. The study concluded that the policy "has resulted in a number of whites who were in predominantly black schools going to other schools." Defendants have repeatedly rejected proposals to modify their transfer policy so as to reduce its adverse racial impact.

D. *Faculty*

In 1972, 79 percent of Milwaukee's black teachers taught in schools with majority black enrollments. Generally, no more than 50 percent of the teachers at these schools were black. The District Court found that this racial pattern resulted primarily from defendants' method of filling vacancies. First priority was given on a seniority basis to teachers who wished to transfer. Often, these teachers wished to transfer from black to white schools, though the District Court did not find the transfers to be racially motivated. Consequently, the vacancies left to be filled by new employees tended to be in core schools. Since most of the black teachers were hired relatively recently as part of a recruiting campaign by defendants, they were likely to be assigned to fill these vacancies. One of the factors in determining how vacancies were filled by new teachers, the District Court found, is "personal background (including racial or ethnic considerations to the extent this related to

8 In several of these instances this was the result of blacks transferring into the school.

teachers' cultural backgrounds)." 408 F.Supp. at 796. Another factor was teacher preference. Defendants have, however, made efforts to dissuade white teachers from transferring out of core schools, and to assign some black teachers to white schools.

Although the primary cause of the racial imbalance was the priority given under the collective bargaining agreement to transfer requests by teachers with seniority, this was not the only cause. Vacancies that arise during the summer do not have to be filled on a seniority basis. One board member stated that for this reason "there were close to 50 percent, either 40 or 50 percent of the teachers who could be slotted into certain schools without being too concerned about a contract. . . . So that there is some flexibility to have the kind of faculties that might be advantageous in individual schools." Moreover, the record does not show that the collective bargaining agreement required a seniority preference in filling vacancies prior to 1968, yet there was a strong racial imbalance in teaching assignments by 1965. Defendants must therefore bear some part of the responsibility for the teacher imbalance.[9]

III. The Existence of Segregation

As we noted at the outset, the District Court concluded, 408 F.Supp. at 821, that

> "defendants have knowingly carried out a systematic program of segregation affecting all of the city's students, teachers, and school facilities, and have intentionally brought about and maintained a dual school system."

9 At oral argument in this court, counsel for defendants suggested that the seniority transfer provision had been obtained "under practical threat of strike." We find no support for this statement in the record. The only strike issue evidenced by the record apparently involved the right of teachers already employed by the system not to be moved out of their current jobs against their wills, not their right to a preference when they voluntarily decide to transfer.

Defendants argue that the court did not "make any findings that any school in the Milwaukee system ever was or presently is segregated." Further, relying on certain language in *Keyes v. School District No. 1*, 413 U.S. 189, 197, 93 S.Ct. 2686, 2690, 37 L.Ed.2d 548 (1973),[10] they argue that to find segregation a court must find that "the percentage of a school's student body, faculty and staff [are] so high as to identify the school as black in the community's view, and it must have as a result thereof a reputation of educational inferiority." The conclusion of this argument is that "[w]ithout a finding of segregation, even if acts and/or omissions were engaged in with the requisite intent to segregate, it would be improper to find an Equal Protection violation and to impose a remedy."

The passage in *Keyes* upon which defendants rest their argument does not say that every element there listed is indispensable to a finding of segregation. Nor does it contain any mention of "a reputation of educational inferiority," or any suggestion that only a school that has such a reputation can be found to be racially segregated. To accept defendants' argument would be to resurrect the doctrine of "separate but equal."

10 The Supreme Court stated as follows:

> "What is or is not a segregated school will necessarily depend on the facts of each particular case. In addition to the racial and ethnic composition of a school's student body, other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school, must be taken into consideration."

We do not think the District Court's findings are fatally defective because they do not contain a finding that any specific school is segregated. The findings as to the system as a whole are sufficient, when read in the context of evidence and other findings from which it appears that in a school system having a black-white ratio of 1 to 2, over 70 percent of all black secondary students and more than 80 percent of black elementary students attended schools that were more than 80 percent black, while over 90 percent of the system's white students attended schools that are 20 percent black or less.[11] Of the system's 5,700 teachers, 15 percent were black. Eighty percent of the black elementary school teachers taught in schools with black pupil percentages of over 80 percent, and more than 70 percent of the black secondary school teachers were assigned to 80 percent black schools. The statistical evidence, without more, shows that the system is in substantial part segregated in fact. Whether that segregation is unlawful depends upon its cause.

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11 From the table in note 4, *supra*, it further appears that approximately 19 percent of the elementary schools were over 90 percent black and 59 percent were less than 10 percent black; over 30 percent of the junior high schools were 67-100 percent black (two thirds of these being 90 percent black or more) and over half were 10 percent black or less; and in the system's 12 three-year and four-year neighborhood high schools only 27 percent of all pupils were black, but two schools were in the 90-100 percent black category and eight were in the 10 percent or less bracket. Thus, the Milwaukee school system could be considered segregated even if we accepted defendants' argument that a school must be 75 percent black to be segregated. Actually, that argument is meritless. The *Keyes* Court said that it "intimate[d] no opinion whether the District Court's 70%-to-75% requirement was correct." 413 U.S. at 196, 93 S.Ct. at 2691. Defendants apparently view this as indicating that the Court would not find a school which was much less than 70 percent black to be segregated. They overlook the next sentence, in which the Court said, "the District Court used those figures to signify educationally inferior schools, and there is no suggestion in the record that those same figures were or would be used to define a 'segregated' school in the *de jure* context." The Court then added that what is a segregated school depends on the facts of each case.

IV. Racially Discriminatory Purpose

In *Keyes*, the Supreme Court made it clear that "the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose or intent* to segregate." 413 U.S. at 208, 93 S.Ct. at 2697 (original emphasis). The Court has recently reiterated that a "racially discriminatory purpose" is essential to an equal protection violation in school cases, as in other cases. *Washington v. Davis*, U.S. , , 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976). The principal issue in *Keyes* was said by the *Washington* Court to be "whether and to what extent there had been purposeful discrimination resulting in a partially or wholly segregated school system." *Id.* at , 96 S.Ct. at 2049-2050. That is also the issue in the case at bar.

Purpose may of course be inferred from "the totality of the relevant facts," which may include discriminatory impact. *Washington v. Davis, supra,* U.S. at , 96 S.Ct. at 2049. As Mr. Justice Stevens said in his concurring opinion in that case, "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor." *Id.* at , 96 S.Ct. at 2054.

The findings as to purpose or intent made by the district judge (who sat through 30 days of testimony, viewed hundreds of exhibits and deliberated two years before issuing his opinion), like any other finding of fact, can be set aside only if they are clearly erroneous. *United States v. Board of School Commissioners*, 474 F.2d 81, 85, 88-89 (7th Cir.), *cert. denied*, 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041 (1973) (*Indianapolis I*). That is, the findings must stand unless on reviewing all the evidence we are "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

The District Court noted that defendants "always had a nondiscriminatory explanation for their acts," citing as examples actions relating to teacher placement, additions to black schools, boundary line changes, and the free transfer policy.[12] 408 F.Supp. at 818-819. While the explanations "on an isolated basis seem reasonable and at times educationally necessary," when considered together, the acts demonstrated, the judge found, "a consistent and deliberate policy of racial isolation and segregation. . . ."[13] *Id.* at 819. The court found it "hard to believe that out of all the decisions made by school authorities under varying conditions over a twenty-year period, mere chance resulted in there being almost no decision that resulted in the furthering of integration."[14] *Id.*

12 The court's crediting of testimony that defendants believed in integration as a goal for society was not necessarily inconsistent with the finding that they deliberately maintained segregation. An abstract belief in the long-range goal is not inconsistent with short-range intent to continue segregation for the time being.

13 Defendants suggest that the scope of our review is broadened because the district judge included this statement in the section of his opinion entitled "Conclusions of Law." We do not find this characterization of the statement controlling.

14 In their reply brief, defendants point to two examples of decisions furthering integration: attempts to recruit blacks for Milwaukee Tech, a trade school, and "[b]lack teacher profiling policy leading to dispersal throughout the system." At oral argument, defendants also claimed for the first time that the decision to move the 9th grades of Peckham and Steuben Junior High Schools to Washington High School (which they would have attended anyway as 10th graders), was an example of an action furthering integration.

First, these scattered actions do not impair the finding that "almost no decision" further integration.

Second, in none of these instances did the board risk any substantial influx of blacks into white neighborhood schools which they would not otherwise have eventually attended. As stated in the text, we sustain the District Court's finding that the essence of defendant's segregatory intent was to avoid such an influx.

Third, we said in *Indianapolis I* that "[e]specially as to actions taken after the date on which the suit was filed . . . such actions go more to the propriety of granting equitable relief than to the merits of the district court's findings." 474 F.2d at 89.

In finding segregatory purpose, the court was justified in relying upon testimony by certain defendants. For example, the superintendent explained that he had not recommended manipulation of school boundaries to increase racial balance and had instead tried "to stay pretty close to the basic policy" (*i.e.*, the neighborhood school policy), because "once you embark upon that," it is "a changing frontier that changes and changes defeating the purpose and really in a sense stepping up a continuous exodus." He explained that "once you begin to disrupt the stability of a particular community, it seems to escalate the exodus. Those who have fears of whatever types seem to pick up and move. This opens up housing patterns . . . for minorities. . . ." The record also shows that defendants viewed racially mixed schools as "problem" schools, likely to be plagued by racial incidents, poor teacher morale, and declining academic standards. See 408 F.Supp. at 822.

The evidence does not indicate, and the District Court did not find, that defendants intended to shortchange black students. See 408 F.Supp. at 810. There is evidence, however, from which it can be inferred that the prevailing belief of the Board was that any large influx of black students into white schools would lower the quality of education available to white students there and would eventually cause them to leave those schools. A natural consequence of this belief, the District Court could properly find, was to attempt to insulate white students from attending schools with large numbers of blacks. The court could properly infer from the record a connection between this belief and such actions as transferring white residential blocks from black schools to schools with a higher percentage of whites, allowing white students to transfer out of black schools, and intact busing, quarantining whites from large numbers of blacks who were bused into white schools.

The open-transfer policy, even though concededly adopted for a proper purpose, proved to be a vehicle for white transfer to white schools. Defendants' original motives in adopting this policy could not excuse a refusal to modify it based on improper reasons. *Morgan v. Kerrigan*, 509 F.2d 580, 589-590 (1st Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449 (1975). There was evidence from which it could be inferred that defendants did not wish to impede white parents from withdrawing their children from racially mixed schools. When an assistant superintendent was asked at trial whether any of the purposes of the transfer system related to achieving racial balance, his testimony in response was that "it is not essentially for that. It is essentially to give parents an option where they wish to send their children." He added that it was a means to facilitate racial balance to the extent parents chose to use it for that purpose. This view is amplified in a proposed finding defendants submitted to the District Court, in which it is stated that some board members believed in creating "an opportunity for those students who are so motivated to attend schools of their choice outside their neighborhood district schools and to associate with pupils and teachers of their choice," while others believed that "if some parents and pupils desire access to a non-neighborhood school because it has a higher achievement level, or a higher percentage of blacks, or a lesser percentage of blacks, or values of a particular ethnic group are prevalent, or for any other reason, the System should afford such an opportunity."

An adverse inference could properly be drawn from defendants' persistence in intact busing. They have not explained why they waited so long to limit what has been called a "commonly used," "classic segregative technique." See *Higgins v. Board of Education*, 508 F.2d 779, 787 (6th Cir. 1974).

It could further have been inferred that teacher assignments not governed by the collective bargaining agreement were not made in accordance with racially neutral principles. Teacher imbalance existed before the transfer provision was adopted. While full responsibility for the teacher imbalance cannot reasonably be placed on defendants, their attempts to disclaim any responsibility for it are not persuasive for the reasons discussed above.

This brings us to the justifications for school boundary and siting decisions. Defendants here rely on the findings that they "consistently and uniformly adhered" to a neighborhood school policy, 408 F.Supp. at 780, and that although "with respect to any such decision, alternatives were available which would have resulted in schools which are presently predominantly black having substantially lower proportions of their students nonwhite, . . . these alternatives were not consistent with the neighborhood school policy and, consequently, were not adopted." 408 F.Supp. at 788. These findings may be read as meaning that defendants hewed to their neighborhood school policy solely for racially neutral reasons and that the racial effects were not intended as such but were merely an unavoidable result; and, if so read, they cannot be said to be indicative of segregative intent. Here, as elsewhere, there is an unexplained hiatus between specific findings of fact and conclusory findings of segregative intent. The District Court is, however, entitled to a presumption of consistency, and we should, therefore, read the findings as elements of a presumably harmonious whole and interpret them as internally consistent when it is possible to do so. Reading the neighborhood-school-policy findings just referred to with the other findings, it is apparent that the former were not meant to describe all cases and that the court did not, as defendants contend, find that their challenged actions were entirely motivated by a racially neutral intent to adhere to a neighborhood school policy.

In this connection, the record shows a number of instances in which pupils could have been allocated between schools in such a manner as to foster integration without violating the neighborhood school policy. In these cases transferring some blacks to a nearby white school would also have resulted in a more equitable allocation of class space at the two schools. Defendants chose the most segregative option.[15] While there are grounds for inferring segregative intent from defendants' actions,[16] they also demonstrate the degree of flexibility defendants had in applying their neighborhood school policy.

In finding discriminatory intent, the District Court could properly consider, together with the other evidence, defendants' refusal to adopt integration proposals, *United States v. School District 151*, 404 F.2d 1125, 1133 (7th Cir. 1968); *Morgan v. Kerrigan, supra*, 509 F.2d at 585-586, even though that refusal alone would not prove the requisite intent. The District Court found that

15 Examples are Walnut and Center Schools, both of which were racially mixed and over-crowded. It appears that there were vacancies at nearby white schools which could have accommodated black students from these schools. Defendants had at least three options: they could have transferred only a few blocks closest to the white school to that school, even though those blocks were predominantly white; they could have transferred those blocks and additional blocks containing black students, assuming we are right in concluding that there was room to accommodate additional students; or if we are wrong about that, they could have transferred blocks containing blacks instead of the blocks containing whites. Defendants chose the first option. It is true that the last two options would probably have lengthened distances some children had to walk to school, but it is also true that the length of the walk still would have been in the range the defendants found acceptable. This is shown in one case (Center) by the fact that the white school was originally intended by defendants to replace the black school, which means that children in the black school district would have had to walk to the white school, while in the other case (Walnut), many children in the white school's district lived farther from that school than many of the children in the black school's district.

16 In light of the disparity in available space, it is not easy to understand why defendants chose to bus large numbers of students to

(footnote cont.)

> "[t]here have not been any affirmative actions taken by the Board that have resulted in further integration or substantial lessening of the percentage of black students in any of the system's schools, nor has the Administration made any such recommendations despite discussions and evaluations by both the Administration and the Board.
>
> . . . . .
>
> "The following means of attempting to achieve greater racial balance and further integration within the system were deemed to be inconsistent with the neighborhood school policy and accordingly were never used: pairing of schools, busing of pupils, utilization of magnet schools, modification of open transfer system, and noncontiguous or pie-shaped districts." 408 F.Supp. at 808-809.

This finding is not attacked as clearly erroneous. Modifying the open transfer system, thereby placing more pupils in schools in their own neighborhoods, would not have been inconsistent with the neighborhood school policy. It is also noteworthy that, although defendants were willing to deviate from the neighborhood school concept in other special educational programs, such as that for gifted children, they sought to rely on that policy as the justification for their refusal to use magnet schools.

Viewing all the evidence, including the statistics showing racial imbalance in the Milwaukee Schools, which is one factor the court may consider in determining whether *de jure* segregation exists, see *Indianapolis I, supra*, 474 F.2d at 85,

Center while hardly busing into the adjacent white school at all. Defendants' reliance on the neighborhood school policy at Walnut is undermined by their decision in 1963 to bus students out of Walnut to a school over 1½ miles away in order to reduce class sizes.

we conclude that the District Court was not clearly erroneous in finding that defendants acted with the intent of maintaining racial isolation. While arguably no individual act carried unmistakable signs of racial purpose, it was not unreasonable to find a pattern clear enough to give rise to a permissible inference of segregative intent. Compare, *e.g.*, *Indianapolis I, supra*, 474 F.2d at 84.

Defendants argue that at worst their conduct merely accelerated the transformation of schools on the racial frontier into predominantly black schools. These schools, they say, would inevitably have become predominantly black in any event, because of white flight as blacks moved into these neighborhoods.[17] As we said in *Indianapolis I*, "it would be improper to allow the Board to follow policies which constantly promote segregation and then defend on the *presumption* of inevitability." 474 F.2d at 89 (original emphasis).

Since we conclude that the District Court was not clearly erroneous in finding segregation in the Milwaukee School System caused by official conduct undertaken with segregative intent, we affirm the holding that the Milwaukee Public School System is unconstitutionally segregated.

Affirmed.

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17 Defendants concede in their reply brief, however, that their open transfer policy is "in limited instances" linked causally to "present imbalance in the system."

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 22, 1976

Before
Hon. Philip W. Tone, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Robert A. Grant, Senior District Judge*

KEVIN ARMSTRONG, etc., et al.,

Plaintiffs-Appellees,

No. 76-1130

vs.

THOMAS BRENNAN, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Wisconsin

No. 65 C 173

John W. Reynolds, Judge.

ORDER

On consideration of the "petition for rehearing en banc" filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.

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* The Honorable Robert A. Grant, Senior District Judge of the Northern District of Indiana, is sitting by designation.

Craig AMOS et al.,

Plaintiffs,

v.

BOARD OF SCHOOL DIRECTORS OF
the CITY OF MILWAUKEE et al.,

Defendants.

Civ. A. No. 65–C–173.

**United States District Court,
E. D. Wisconsin.**

Jan. 19, 1976.

**DECISION AND ORDER
(Including Findings of Fact and
Conclusions of Law)**

REYNOLDS, Chief Judge.

I. PRELIMINARY MATTERS

A. *Introduction*

In this school desegregation case, plaintiffs seek declaratory and injunctive relief against acts of the defendants allegedly violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

On March 28, 1968, plaintiffs were granted leave to file an amended complaint. The amended complaint names forty-one minor plaintiffs who bring the action by their parents and next friends on behalf of themselves and two classes. Named as defendants are the Board of School Directors of the City of Milwaukee and sixteen individuals

sued in their official capacities as members or servants and agents of the defendant Board. Federal jurisdiction is invoked under 28 U.S.C. Section 1343, the jurisdictional counterpart of 42 U.S.C. Section 1983.

The amended complaint claims that the defendants have acted to create and maintain unlawful racial segregation in the Milwaukee public school system. I have concluded that segregation exists in the Milwaukee public schools and that this segregation was intentionally created and maintained by the defendants. Such segregation is violative of the equal protection of the laws guaranteed to all Americans by the Fourteenth Amendment and cannot lawfully be allowed to continue. I shall accordingly order that the Milwaukee school system be integrated; that the defendants forthwith begin the formulation of plans to effectively achieve that goal; and that a master be appointed to make recommendations to the Court with respect to the question of an appropriate remedy. In addition, the Court has determined that this action may be maintained as a class action on behalf of two plaintiff classes, and has concluded that these classes should be represented in all further proceedings by appointed counsel.

B. *Appointment of Class Counsel, Class Certification, and Dismissal of Mooted Plaintiffs*

The amended complaint alleges that thirty of the minor plaintiffs are socio-economically disadvantaged Negroes and members of a class which they seek to represent, described in the amended complaint as "Negro students attending certain public schools of the City of Milwaukee * * * who are subjected to socio-economic disadvantages, and who are denied their rights to equal educational opportunity by virtue of defendants' practices, rules, and regulations which bar the maintenance of racially integrated schools." The remaining eleven minor plaintiffs are alleged to be socio-economically favored non-Negroes and members of a class which they seek to represent, described in the amended complaint as

"Non-Negro students attending certain public schools of the City of Milwaukee * * * who are being denied their rights to equal educational opportunity by virtue of defendants' practices, rules, and regulations which bar the maintenance of racially integrated schools."

The amended complaint in this action was filed over seven years ago. Neither the plaintiffs nor the defendants, however, have ever made a Rule 23(c)(1) motion for a determination of whether or not the action can be maintained on behalf of the alleged classes. This oversight on the part of counsel and the Court with respect to the question of class action certification is unfortunate; at this juncture in the proceedings, however, such a determination is both necessary and appropriate. *Jeffery v. Malcolm*, 353 F.Supp. 395, 396 (S.D.N.Y.1973).

In light of the rather substantial passage of time since the filing of the amended complaint, the Court made inquiries of counsel with respect to the issue of mootness. See generally, *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), and *Indianapolis School Commissioners v. Jacobs*, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975). In response to the Court's inquiry, counsel for the plaintiffs filed three affidavits on December 2, 1975. On December 29, 1975, the Court received a letter from the defendants' counsel reciting the results of an examination of the school system's records. From the affidavits and letter, the following appears: Of the 30 black plaintiffs, 5 are presently enrolled in the Milwaukee public school system, 10 have graduated from the system, 1 has moved out of the system, and the present enrollment statuses of 14 are unknown. Of the 11 nonblack plaintiffs, 3 are presently enrolled in the Milwaukee public school system, 1 has graduated, 1 has moved out of the system, and the present enrollment statuses of 6 are unknown.

It is well established that class certification is

appropriate in cases challenging segregation in public schools. See e.g., *Vaughns v. Board of Education of Prince George's County*, 355 F.Supp. 1034 (D.Md.1972), supplemented, 355 F.Supp. 1038 (D.Md.1972), remanded on other grounds, 468 F.2d 894 (4th Cir.1972), on remand, 355 F.Supp. 1044 (D.Md.1972); *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963). Such suits are particularly appropriate for certification under the provisions of Rule 23(b)(2) which is available in situations where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Indeed, the Advisory Committee Notes to Rule 23(b)(2) indicate that school desegregation cases fall squarely within the intended scope of the rule: "Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration."

But the Court cannot rest upon a mere finding that the subject matter of this suit is of a kind which is readily susceptible to class action treatment under Rule 23(b)(2). Before a class may be certified thereunder, the Court must first be satisfied that the prerequisites to a class action set forth in Rule 23(a) have been met. The Court will accordingly undertake a seriatim consideration of those factors.

The first prerequisite, set forth in Rule 23(a)(1), is that "the class is so numerous that joinder of all members is impracticable." During the 1975 school year, 114,180 students were enrolled in the Milwaukee public school system. The Court is convinced that in such circumstances, joinder is not a practical alternative to class action treatment.

The second prerequisite, set forth in Rule 23(a)(2), is that "there are questions of law or fact common to the

class." In passing on the plaintiffs' claims, the Court must first determine what actions were taken by the defendants and what the effects of those actions were, and then make a finding as to the lawfulness of the defendants' practices. These factual and legal questions are clearly common to the alleged classes.

The third prerequisite, set forth in Rule 23(a)(3), is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Once again, the Court concludes that this prerequisite is easily met. With the benefit of hindsight, it is clear that the claims of the representative parties have not been atypical but, to the contrary, have been fully representative of the claims of the classes.

The final prerequisite to class action treatment, set forth in Rule 23(a)(4), is that "the representative parties will fairly and adequately protect the interests of the class." At the outset, it must be noted that Rule 23(a)(4)'s requirement of adequacy of representation is separate from Rule 23(a)(3)'s requirement of typicality, and both requirements must be met before an action may proceed on behalf of a class. An atypical representative party will not be allowed to prosecute a class action, regardless of the adequacy of his representation; similarly, the typicality of a named representative party does not necessarily guarantee adequate representation. Although the distinction between the two requirements is not crystal clear, Rule 23 suggests that a separate determination with respect to the question of adequacy of representation is in order.

Rule 23(a)(4) implicitly refers to both the representative parties and their attorneys when it speaks of adequate protection of the interests of the class. *Brandt v. Owens-Illinois, Inc.*, 62 F.R.D. 160, 165 (S.D.N.Y.1973). Thus, in considering whether a litigant will adequately

represent a class, the Court must look at two criteria: whether the representative parties' attorney is qualified, experienced, and generally able to conduct the proposed litigation, and whether there is any probability that the suit is collusive or that the named parties have interests antagonistic to all or part of the class. *Williams v. Local No. 19, Sheet Metal Workers International Association*, 59 F.R.D. 49, 55 (E.D.Pa.1973). In making a determination under Rule 23(a)(4), the personal characteristics of both the representative parties and their counsel must be examined. *In the Matter of Goldchip Funding Co.*, 61 F.R.D. 592 (M.D.Pa.1974). *Stavrides v. Mellon National Bank & Trust Co.*, 60 F.R.D. 634 (W.D.Pa.1973).

Putting the question of adequacy of counsel aside for the moment, the Court concludes that those plaintiffs who are presently enrolled in the Milwaukee public school system will adequately represent the two classes of pupils alleged in the amended complaint. The record contains no suggestion that this suit is collusive, nor does it appear that the interests of the presently enrolled plaintiffs are in any way antagonistic to the interests of the asserted classes.

In determining the counsel portion of the adequacy of representation requirement, the "* * * Court should weigh, among other factors, the actual qualifications and experience of the self-selected champion for the proposed class. * * * Skilled representation may be crucial, for the outcome of a class suit – whether favorable or adverse to the class – is binding on the members of the class. * * * " *Jeffery v. Malcolm*, 353 F.Supp. 395, 397 (S.D.N.Y.1973). In cases where it has been determined that the experience, qualifications, and skills of the representative party's counsel are inadequate, courts have refused to allow the action to proceed on behalf of a class. *Jeffery v. Malcolm*, supra.

Most of the reported cases considering the question of adequacy of counsel involve situations where the issue of

class action certification has been raised at a relatively early point in the proceedings. The problem assumes different proportions where, as here, the question of class action certification first arises after the underlying claims have gone to a trial on the merits. In such circumstances, the Court is convinced that both the standards of legal representation and the response to a finding of the inadequacy thereof should be tailored to and reflect the posture of the proceedings.

Although at the time of the filing of the amended complaint plaintiffs were represented by no less than seven lawyers, subsequent events, including the withdrawal of attorneys from the National Association for the Advancement of Colored People ("NAACP") on the morning of trial, have left the plaintiffs with only one attorney, Mr. Lloyd A. Barbee. Mr. Barbee is an accomplished practitioner, and the Court commends him for his dedication and perseverance throughout the long course of this protracted piece of litigation. The Court would furthermore make a finding that the services of Mr. Barbee to date have been more than adequate, and that the members of the alleged classes have been adequately represented by his diligent efforts. At the same time, however, the Court must be conscious of the fact that the finding of liability contained in today's decision marks the advent of a new stage in these proceedings. The Court will take steps to facilitate an appeal from the finding of liability should the parties so desire, but remedial efforts will proceed unabated during the course of any appellate review. In light of the possibility of an appeal and remedial efforts proceeding simultaneously, and giving due consideration to the fact that remedial efforts will proceed at an accelerated pace, the Court has concluded that the interests of the two alleged classes cannot be fully and adequately represented in future proceedings by a single practitioner, moreover a single practitioner who has, as does Mr. Barbee, the additional demanding duties of a representative in the state legislature.

As previously noted, the peculiar circumstances in which the question of class certification arises and, in particular, the overwhelming demands which will be placed on the classes' counsel in the near future, warrant the application by this Court of a heightened standard of counsel adequacy at this point in the proceedings. It should be emphasized that the result of this heightened standard's application is not intended in any way to adversely reflect on Mr. Barbee's efforts to date, but is a realistic appraisal by this Court of the expanded needs of the asserted classes in subsequent proceedings. In a similar manner, the Court is persuaded that the circumstances of this case militate against the usual consequence of a finding that the representative parties' counsel cannot adequately represent the interests of the proposed classes, i. e., a refusal to certify class action status. Mr. Barbee had adequately represented class interests to date, and the finding of liability which the Court will today enter is evidence thereof. The efforts and resources which have already gone into this case cannot be overemphasized. Giving due regard to considerations of judicial economy, the Court deems it appropriate to appoint counsel to represent the interests of the absent class members.

The Court is convinced that this step is fully consistent with the spirit of Rule 23 of the Federal Rules of Civil Procedure. Rule 23 imposes on the Court an obligation to proceed with flexibility and imagination in structuring the course of class action. *Forbes v. Greater Minneapolis Area Board of Realtors*, 61 F.R.D. 416, 417 (D.Minn.1973). At the same time, the Court has responsibilities as the guardian of the rights of the absentee class members, and to carry out those responsibilities, is "vested [with] broad administrative, as well as adjudicative, power." *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 832 (3rd Cir. 1973). It must be remembered that the creation of a class action is a

two-step process, for "both the class determination and designation of [class] counsel * * * come through judicial determinations * * *." *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2d Cir. 1973).

In certifying a class action, the Court not only confers upon absent persons the status of litigants, but in addition it creates an attorney-client relationship between those persons and a lawyer or group of lawyers. While in most instances lawyers designated as legal representatives of the class are the retained counsel of the named representative parties, there appears to be no good reason why this should necessarily be so. The relationship between the representative parties and their lawyer or lawyers is one of private contract; the relationship between the class counsel and the members of the class, apart from the representative parties, is one of court creation. To hold that the Court is limited in its choice of class counsel to attorneys appearing for the representative parties – to assert, in effect, that the class will be represented by those attorneys or not at all – is to instill a controlling element of entrepreneurial initiative into the situation which may be contrary to the best interests of the class which the Court has a fiduciary obligation to protect. The Court concludes that it is in no way anomalous to hold that the representative parties are, as persons, adequate representatives of a class, and that those parties may continue to be represented by their privately retained counsel, and at the same time to hold that the interests of the absent class members will be best served by the appointment of separate counsel.

While unable to point to direct precedent for such a conclusion, the Court finds that indirect authority provides substantial support for this procedure. The appointment of class counsel other than the lawyer for the representative parties bringing the suit may well be necessary whenever the device of a subclass is used. *Brandt v. Owens-Illinois, Inc.*, 62

F.R.D. 160, 171 (S.D.N.Y.1974). In situations where counsel for the representative party is unable, either personally or through his firm, to provide the requisite legal services (as, for example, where simultaneous depositions are scheduled at various locations throughout the country), the Manual for Complex Litigation recognizes that the interests of the class may be best served by the employment of additional counsel. 1 Moore's Federal Practice, Part 2, Section 1.44, at 40-41 (2d ed. 1975). Finally, Rule 23 itself, in subsection (d) thereof, provides that absent members of the class may intervene with counsel of their own and, more generally, constitutes recognition of the Court's residual power to issue orders in conduct of actions to which the rule applies.

In considering the appointment of counsel to represent the classes alleged in the complaint, the Court has been particularly conscious of the tremendous demands which representation of the classes will place upon counsel. As previously noted, it is unlikely that any individual practitioner would be able to meet those demands. The Court accordingly deems it necessary to appoint as class counsel an individual who will have access to the substantial legal resources of a large law firm. With that in mind, the Court has decided to appoint Irvin B. Charne, of Milwaukee, Wisconsin, to represent the absent class members in the future course of this litigation. Mr. Charne heads a prominent Milwaukee firm of seventeen lawyers whose services will undoubtedly be necessary as the pace of this action increases.

The appointment of Mr. Charne is in no way intended to preclude the participation of the representative parties' retained counsel in subsequent proceedings. Mr. Barbee's service to date has been laudable, and his continued contributions in the future, based upon his experience and expertise in this area, will be both necessary and invaluable.

In accordance with the foregoing and pursuant to the provisions of Rule 23(c)(1), the Court will order that this action be maintained as a bipartite Rule 23(b)(2) class action. The first class shall consist of all black pupils presently enrolled and those black pupils who will in the future become enrolled in the Milwaukee public school system. This class will be represented by the five presently enrolled black plaintiffs: Kevin Armstrong, Kraig Armstrong, Mary Lou Hicks, Presten Hicks, and Jean Robinson.

A second class consisting of all nonblack pupils presently enrolled and those nonblack pupils who will in the future become enrolled in the Milwaukee public school system will also be certified. This class will be represented by the three presently enrolled nonblack plaintiffs: Andrew Smith, Grantley H. Smith, and Kermit Smith.

The five presently enrolled black pupils and the three presently enrolled nonblack pupils will continue to be represented by Mr. Barbee. The remaining members of the certified classes will be represented by Mr. Charne. The Court is not unmindful of the fact that each of these lawyers will be representing members of two separate classes. At the present time, it does not appear that the interests of these two classes are in any way antagonistic, or that the interests of either class will be prejudiced by counsel's representation of both. See *Brandt v. Owens-Illinois, Inc.*, 62 F.R.D. 160, 171 (S.D.N.Y. 1973). If in the course of future proceedings it appears that the interests of these two classes diverge, the Court will entertain a motion for the appointment of separate counsel for each class.

Since the amended complaint seeks declaratory and injunctive relief only, the claims of the thirteen plaintiffs whom the record establishes have graduated from the system or moved from the district are presently moot. Accordingly, the following plaintiffs will be dismissed from the action:

Craig Amos, Jeffery Amos, Everett Keith Armstrong, Ann Marie Danforth, Carolyn Harper, Alberta Louise Hicks, Sylvia Hicks, Donna Jean O'Neal, Kim A. Robinson, Ronald K. Robinson, Cherry L. Smith, Harvard Watkins, and Vivian Watkins.

Fourteen plaintiffs remain whose present status is unknown. In the absence of an affirmative showing of a continuing case or controversy between these plaintiffs and the defendants, the Court feels constrained to dismiss them from the action. If in fact they are presently enrolled in the Milwaukee public school system, their claims may be considered to be subsumed in the claims of the certified classes.

At this time, it is appropriate to comment upon the applicability of 20 U.S.C. Section 1617, which in relevant part provides:

> "Upon the entry of a final order by a court of the United States against a local educational agency * * * for failure to comply with * * * the fourteenth amendment to the Constitution of the United States as [it] pertain[s] to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The record in this case clearly reveals that this lawsuit was necessary to rectify the unconstitutional segregation which exists in the Milwaukee public school system. It is similarly clear that today's decision establishing the liability of the defendants provides a basis for the award of attorneys' fees. "* * * [T]he entry of any order that determines substantial rights of the parties may be an appropriate occasion upon

which to consider the propriety of an award of counsel fees in school desegregation cases." *Bradley v. School Board of the City of Richmond*, 416 U.S. 696, 722-723 n.28, 94 S.Ct. 2006, 2022, 40 L.Ed.2d 476 (1974).

In accordance with 20 U.S.C. Section 1617, the Court will, upon an appropriate motion and supporting affidavits, award costs to the named plaintiffs' counsel, including reasonable attorney's fees, for his efforts to date, such costs to be paid by the defendants. In addition, the Court will entertain motions from both the named plaintiffs' and the absent class members' counsel for the award of costs, including subsequently incurred reasonable attorney's fees, from time to time as the remedial efforts proceed.

C. *Dismissal of the Defendant Board*

The Court also concludes that it is necessary to dismiss as a defendant the Board of School Directors of the City of Milwaukee. As previously noted, plaintiffs brought their suit under 42 U.S.C. Section 1983 which reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973), the Supreme Court concluded that a city was not a "person" within the scope of Section 1983. Although there is no Supreme Court decision squarely

in point, the Court believes that a school board is similarly not a "person" for purposes of Section 1983. See, *Adkins v. Duval County School Board*, 511 F.2d 690 (5th Cir. 1975); *Burt v. Board of Trustees of Edgefield City School District*, 521 F.2d 1201 (4th Cir. 1975). As a consequence, this Court does not have subject matter jurisdiction to consider plaintiffs' claims against the defendant Board under 28 U.S.C. Section 1343. *City of Kenosha v. Bruno*, supra. Nor does jurisdiction exist under the federal question provisions of 28 U.S.C. Section 1331. The complaint seeks only equitable relief and does not allege any amount in controversy, much less an amount in excess of $10,000. The Court will accordingly dismiss the defendant Board for lack of subject matter jurisdiction.

The dismissal of the Board, however, does not affect the Court's ability to proceed to a consideration of the merits of this action. Sixteen named individuals remain as parties defendant; they are clearly persons within the reach of 42 U.S.C. Section 1983, and subject matter jurisdiction accordingly exists under 28 U.S.C. Section 1343. Moreover, since these individual defendants were sued in their official capacities as members or agents and servants of the Board, Rule 25(d)(1) of the Federal Rules of Civil Procedure applies, the pertinent portion of which reads as follows:

> "When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. * * *"

Consequently, the relief which plaintiffs seek is enforceable against the present members and secretary-business manager of the Board of School Directors and the present superintendent of schools for the City of Milwaukee, and the Court will order that further proceedings in this case be conducted in their names.

Although the Board will be dismissed from this action, there are references to the "board" throughout this decision. The term is used with the understanding that it serves as a convenient expression for the official actions of the individual defendant Board members.

II. FINDINGS OF FACT

A. *General Background*

1. *Introduction to the Findings of Fact*

This action was brought on for trial to the Court on September 10, 1973. The trial consumed thirty full days of the court's calendar before its conclusion on January 31, 1974, during which time the Court heard the testimony of approximately fifty witnesses and considered the hundreds of exhibits introduced into evidence by the parties. At the conclusion of the trial, the defendants were ordered to prepare findings of fact based upon the evidence adduced at the trial, said findings to be thereafter commented upon by the plaintiffs. The defendants filed their findings of fact with the court on October 29, 1974, and plaintiffs responded thereto in materials filed on December 13, 1974. The court also received posttrial briefs from both sides as well as an amicus curiae brief from the Wisconsin Education Association Council.

On the basis of the entire record, including all of the aforesaid, and being fully advised in the premises, the Court does herewith make the following findings of fact.

2. *Definitions and Symbols*

In order to achieve some degree of brevity in these findings of fact, it will be necessary to arbitrarily define certain terms and symbols. Unless indicated to the contrary

in the text, the meanings here assigned are the meanings to be ascribed to the words and symbols herein used. Additional abbreviations or means of reference to terms may also be used in specific sections; disclosure of such reference will be by parenthetical indication following the term to which reference is made.

"Administration" refers to the nonelective, employed administrative personnel of the system, including school principals.

"B" used in conjunction with a percentage indicates that the percentage refers to the black or nonwhite portion of the whole to which reference is made, *"W"* is the converse. If the percentage appears without letter notation, it refers to the black or nonwhite racial percentage.

"Black" refers to persons of the negroid race, but on occasion may be utilized interchangeably with the term "nonwhite," reflecting the fact that blacks are the predominant minority racial group in the city.

"Black Central City" refers to that portion of the central city, generally to the north or northwest of the downtown area, which is predominantly black in residential racial composition.

"Board" refers to the 15 elected members of the Milwaukee Board of School Directors which is the governing body of the system.

"Central administration" refers to administrative personnel who serve the entire system as opposed to a particular school within the system.

"Central City" refers to the older central area of the city, including those residential areas on the near north

side which are predominantly black and those on the near south side which are predominantly white.

"City" refers to the City of Milwaukee whose boundaries are coterminous with the boundaries of the system.

"Cluster" refers to the group of schools, including elementary schools and junior high schools, the students of which feed into a specific high school, as well as that high school.

"Feeder school" is a school from which students in the normal progression of their education would enter into a given named school. Both elementary and junior high schools are feeder schools to high schools.

"Majority" used in conjunction with the words black, white, or nonwhite means that more than 50% of the category to which reference is made is of that race.

"1972-73," or any combination of two successive years during the period, refers to the school year commencing in the year first indicated and ending in the year last indicated.

"Nonwhite" refers to the racial group for which some system statistics are available prior to 1963-64, and generally includes all persons and students in the city or in the system other than caucasians.

"Predominantly" used in conjunction with the words nonwhite, black, or white means that substantially more than a majority (usually 90%) of the category to which reference is made is of the race or group used in conjunction with the word "predominantly." If the reference is followed by a parenthetical percentage

disclosure, the percentage figure is the approximate overall proportion of the predominant group.

"Racially balanced schools" are schools which during a given time period had the same percentage of nonwhite students, teachers, and administrators as the system as a whole had during the same time period.

"Racially imbalanced schools" are schools that are not racially balanced.

"School administration" refers to the administrative personnel serving a particular school or schools.

"Substantially racially balanced schools" are schools whose students are not more than 70% nonwhite or black and not more than 90% white.

"Substantially racially imbalanced schools" refers to schools whose pupil population is 70% or more black or nonwhite, or schools that are less than 10% black or nonwhite.

"System" refers to the Milwaukee school system as provided for under Chapter 119, Wisconsin Statutes, and its predecessor statutes.

"The period" refers to the time period between 1950 and the date of trial, to which the majority of evidence and material adduced at trial pertains.

"White" refers to the category of persons who are not nonwhite.

"White Central City" refers to that portion of the central city which is predominantly white in residential racial composition.

3. *System Government*

The Milwaukee school system, whose boundaries are coterminous with those of the City of Milwaukee, is governed by a 15 member Board of School Directors elected at large on a nonpartisan basis to staggered six-year terms.

4. *System Growth*

The Milwaukee school system is one of the fifteen largest public school systems in the United States and consisted of 164 schools as of the school year 1973-74. In terms of pupil enrollment and the number of schools in the system, it has undergone a period of rapid growth in the past twenty-five years.

Between the school years 1950-51 and 1973-74, the total number of schools in the system increased by 71%. Sixty-five per cent of this growth occurred during the decade 1950-60, and 81% of this growth took place during the period 1950-65. In 1950-51, there were 79 elementary schools, 4 junior high schools, and 12 high schools (exclusive of special schools) in the system. By 1960-61, the system had grown to 115 elementary schools, 12 junior high schools, and 12 high schools. In 1973-74, there were 121 elementary schools, 19 junior high schools, and 15 high schools in the system.

In 1950, the system enrollment was approximately 67,000 pupils. By 1964, enrollments had increased by about 80% to over 120,000 pupils. During the decade 1950-60, the system and city area nearly doubled from 49 to about 92 square miles. School enrollment leveled off at 128,000 pupils in October 1972 (when the system's area was 96.5 square miles) and declined thereafter.

5. *Black Population Growth*

The city's black population quintupled between 1950

and 1970. In 1950, there were 21,772 black residents approximately 3½% of the city's population. During the decade 1950-60, the city's black population tripled to 62,458 (8½% of the city's population), the highest sustained rate of growth of any large city in the country. By 1970 the city had approximately 105,088 black residents (about 14½% of the population), an increase of 68% over 1960. The rise in the city's black population between 1950 and 1970, which amounted to a percentage increase in excess of 500%, was largely caused by migration from the South, particularly the central southern states of Tennessee, Arkansas, Alabama, and Mississippi. However, a relatively high birth rate among black residents was also a contributing factor.

During the period 1950 to the present, the number and percentage of black pupils in the system rose at a faster rate than the total black population. For example, the number of black (or nonwhite) pupils in the system increased from about 24,000 (19.8%) in 1964 to about 28,000 (22.2%) in 1966. Black pupils presently comprise about 35% of the system's pupil population, more than double the proportion of black residents in the city.

6. *Black Residential Patterns*

The overwhelming majority of the city's black population has tended to reside in a relatively small contiguous area in the north central and northwestern central area of the city. As of 1940, about 78% of the 8,821 black residents resided in an area bounded by West Juneau Avenue, North 12th Street, West Brown Street, and North Third Street. The remaining black population resided in contiguous areas with a very small portion residing in enclaves located elsewhere in the city.

By 1950, the residential area occupied by the majority of the city's 22,129 black residents had expanded

substantially. The bulk of the black residents were concentrated in an area bounded by Juneau Avenue, Third Street, Wright Avenue, and Seventh Street.

As of 1960, 90% of the city's 62,458 black residents (about 95% of the total nonwhite population of the city) resided in an area bounded by Keefe Avenue on the north, 20th Street on the west, Juneau Avenue on the south, and Holton Street and the Milwaukee River on the east, with lesser concentrations of black residents in the fringes of this area and with a few residing in several outlying areas. In this area of heaviest nonwhite residential concentration, 62% of the residents were nonwhite.

As of 1970, almost all of the city's nearly 105,000 black citizens resided in an area generally bounded by Capitol and Congress on the north, 35th Street on the west, Holton and the Milwaukee River on the east (with the area north of Locust and east of Holton still having a relatively large white population), and Juneau on the south, continuing the pattern of expansion to the north and northwest. About 90% of the city's black population resided in this area which was 65-75% black overall, ranging from about 40% on the periphery to 75-80% and more near the center. The particular areas in the city to which black citizens have moved have been determined primarily by the areas in which residential vacancies have occurred in combination with the particular needs, desires, and incomes of the black citizens. Important factors which have determined the nature and direction of black residential expansion have been the location of some physical barriers (e. g., industrial and commercial development along the southern boundary of the north-central city), the housing characteristics of the surrounding areas, and the relative age of the white population occupying this housing. Black citizens, as had been common with other ethnic minorities, have tended to seek housing near areas already heavily populated by black citizens.

Income levels have been very important in determining where black citizens have lived. For example, the area south of Center Street is basically a low income area; the area north of Center Street to Capitol Drive is a somewhat higher income area; and the area north of Capitol Drive is a middle class area. The middle income black citizens are generally older and live in more expensive, owner-occupied, single family dwellings to the north and northwest. Black citizens with lower incomes tend to be younger and tend to move toward the west into multiple family dwelling units, with the more expensive older housing to the west serving as an economic buffer to further expansion.

7. *The Neighborhood School Policy*

The Board has consistently and uniformly adhered to a "neighborhood school policy," first developed in 1919. The essence of that policy has been the assignment of students to schools within reasonable geographic distances of the students' residences. The policy has controlled the allocation of students among the schools in the system for attendance purposes, except as to students who have voluntarily transferred from their neighborhood schools pursuant to the Board's free transfer and open transfer policies (described more fully, *infra*) and except for certain special educational programs.

In general, senior high school, junior high school, and elementary school attendance zone radii have been approximately 1 mile, ¾ mile, and ½ mile, respectively, with consideration given to such factors as difficulties in site acquisition, land availability, problems in land use, availability of funds, residential development, natural or city boundaries, relative rates of pupil population growth in neighborhoods, and safety. There have been exceptions where practicalities have dictated a departure from normal distance standards.

The Board has pursued its neighborhood school policy with the conviction that it is consistent with and best promotes its policy of providing the children enrolled in the system with the best possible education limited resources will permit. The Board believes that this policy is convenient for pupils and their families, maximizes parental involvement in and support for the neighborhood school, involves the school in the community, fosters the utilization of school programs geared to the particular needs of pupils residing in the neighborhoods of the schools, and minimizes departmentalization of the student's life between school, family, and neighborhood. This central policy has been supported through the years by most Board members and has been of decisive importance in a host of decisions concerning how and where students were and will be educated, including decisions with respect to new school site selection and construction, school remodeling, school building additions, and actions taken to meet the increased crowding in the schools during the 1950's and early 1960's.

B. *System Growth and Overcrowding*

During the period stretching from 1950 through 1968-69, and to a lesser extent in recent years, there were great increases in the number of students enrolled in the system in both the developing residential areas on the periphery of the city and in the older residential areas into which black families were moving.

In 1950, the school census showed 119,368 children (with a total enrollment of 69,131), and by 1959 the school census was 175,486. By 1964, the total enrollment in the system's schools was 120,343, an increase of about 80% over 1950, and by 1968 it was 130,736. From 1950 to 1965, the system's area doubled (47.95 to 95.78 sq. miles), and the City's population went from 637,392 to an estimated 761,000. The 1950 census indicated that children aged 0-19

accounted for 28.8% of the city's population, while in 1960 it was 35.8%. In 1968, the estimated school census of children aged 4-19 was 210,125 (25.92% of the total population). This rise in the system's enrollment was caused by new development in some areas, by increased population density in developed areas, by a reduction in the number of children attending nonpublic schools, and by a younger population. During this period the total number of buildings went from 99 to 143, and the total school staff increased from 24,045 to 39,030. The system's total school budget rose from $18,641,190 in 1950 to $68,331,930 in 1964.

There was an uneven spread of school housing needs within the system because of variant residential concentrations. Large numbers of relatively young families locating in newly developing areas created an almost instantaneous demand for schools. In older areas, where single family homes and duplexes had been converted into multiple family dwellings occupied by younger couples with children, an added load was placed on existing school facilities.

During the late 1940's, the Administration began planning an extensive school construction program in order to meet the post-war baby boom. However, the student population boom in the residential areas that were occupied by black residents was not expected or even understood when it initially began developing.

During the 1950's and 1960's, as the percentage of blacks residing in a given residential area increased, the schools whose districts encompassed those areas became increasingly overcrowded. The school overcrowding occurred because (a) age patterns characterizing the black population in the city were much younger than those characterizing the white population which had previously resided in the residential neighborhoods that the blacks were moving into,

and (b) schools in these areas had a smaller teacher-pupil ratio and class size (about three less pupils), thereby reducing these schools student capacities. The differential age pattern was primarily the result of the fact that blacks migrating into the city were relatively young and had a higher fertility rate. There was also a use of what had been single family houses by multiple families, as there was an acute need for additional housing in the black Central City.

During the period, the school districts serving the predominantly black residential areas were overcrowded by Board-Administration standards in the sense that more pupils resided therein than the neighborhood school facilities could handle. Between 1950 and 1960, school enrollments increased 43.5%. The density of children in this area was five times that of other areas in the city. In terms of the number of elementary pupils per square mile, the peripheral area of the city went from 495 to 587 between 1950 and 1960, while the black Central City went from 1,925 to 2,764. High family mobility and substantial in-migration of families from year to year caused large enrollment fluctuations that made planning difficult. Without classroom additions, and sometimes even with them, schools in this area became overcrowded, and their district boundaries were reduced in size.

During this period the basic policies and practices concerning overcrowding were as follows: If an increase in enrollment was causing or was expected to cause overcrowding of a particular school, a determination was made as to whether the overcrowding portended to be short or long term. If deemed temporary, the first attempt was to find additional space in the overcrowded school that could be utilized for classroom purposes, such as below grade classrooms, auditoriums, and gyms. This was deemed educationally desirable, as there would be no sending of pupils outside the neighborhood school, it could be accomplished relatively quickly, and it was relatively

inexpensive. The next preference would be to find nearby adjacent schools that had vacant classrooms that could handle the pupil overload by means of logical redistricting convenient to the pupils, grade reorganization (e. g., reassignment of grades 7 and/or 8) and/or bussing.

The utilization of grade reorganization fit in with the system's policy, initiated in the 1920's, of switching from a K-8 (grades kindergarten through 8) setup to K-6 elementary schools and junior high schools containing grades 7-9. By the early 1950's, the system was approximately half way through this transition. However, grade reorganization was frequently not possible because of a lack of the special facilities needed for the shop and home economics programs required for 7th and 8th grade students. Thus, primary reliance was placed on boundary changes. The least favored alternative was to transport pupils to the nearest classrooms available in other schools.

If the overcrowding was deemed long term, the first consideration would be whether an addition could be made to the existing building or whether existing but unutilized facilities could be brought into service through devices such as renting private school buildings. If additions were not practicable or desirable under the neighborhood school policy, a site for a new school would be selected in a geographic location serving a residential area having sufficient long term student population to justify a school building. Bussing was kept to a minimum whenever practicable because of factors such as cost and parental opposition.

Among the potential alternatives not utilized was increasing the number of students in each class or utilizing half-day shifts.

C. *Boundary Changes*

Boundary changes and grade reorganizations were

primarily made to meet (a) increasing and/or shifting student populations, or (b) changing school capacities such as those caused by completion of new buildings or additions. The boundary changes transferred pupils from an overcrowded school to adjacent schools having available space. Population shifts were flexibly responded to by the adjustment of school district boundaries so as to avoid, insofar as possible, the overcrowding or underutilization of buildings. The basic policy with regard to districting was adherence so far as practicable to the Board's neighborhood school policy after considering the area served, the pupils to be enrolled, and the available school facilities.

The procedure utilized by the Administration in determining its recommendations to the Board was as follows: After a school was identified as overcrowded, an attempt was made to provide relief via adjacent schools having available space capable of handling the needed educational program. The first step was to ascertain with respect to both the overcrowded school and the adjacent schools how many students lived in the district and in each block therein. After the number of available vacant classrooms in nearby adjacent schools was determined, the decision as to the type and nature of relief provided was made. If a boundary change was determined to be appropriate, blocks adjacent to the receiving school district containing sufficient numbers of pupils to fill the number of vacant classrooms were moved into the receiving schools' district.

Boundary changes were useful when the districts adjacent to the overcrowded school were not overcrowded. Where that situation did not exist, it would have been necessary to utilize a series of "domino" type boundary changes in order to alleviate overcrowding via boundary changes.

The Administration never recommended and the Board never made any "accordion" or "domino" type boundary changes whereby a series of boundary changes in three or more contiguous districts were made so as to relieve the overcrowding at one school by ultimately placing more pupils in the most distant school in the series. This was rejected because it was incompatible with the neighborhood school policy and would ultimately compel children to attend schools far from their homes. Such boundary changes could have led to a series of schools being located on the perimeter or even outside the district served. Another factor was parental opposition to such a policy.

With respect to boundary changes affecting all schools in the system during 1962-63 through 1966-67, as well as boundary changes affecting Central City elementary schools during 1943 through 1963, no direct relationship was established between the student body racial percentages of the receiving and/or losing schools, as these percentages varied markedly. Many of the aforesaid boundary changes were between schools with very low percentages of nonwhite pupils. Many involved changes between school districts where there was not a substantial difference in the pupil racial percentages. Where there was a substantial nonwhite percentage, there was no patterned relationship between the losing and receiving school percentages. Where substantial differences in losing and receiving school percentages existed, some involved the transfer of blacks from schools with larger percentages to schools with smaller percentages and from smaller to larger.

The absence of a direct statistical relationship with respect to the racial percentages of schools involved in boundary changes does not support a finding that boundary changes and/or grade reorganizations were devoid of impact upon racial imbalance in the system. The Board asserts that any racial effects attributable to boundary changes involving

schools located in the Central City and adjoining areas were temporary in nature, the short-term impact of such changes being quickly eclipsed by the rapid expansion of black residential populations in these areas over a relatively short period of time. The fact remains, however, that these boundary changes nevertheless affected the timing of student racial change.

In addition, the "compression" effects of boundary changes deserves mention. As black populations moved into neighborhoods previously inhabited by whites, the pupil population of the neighborhood school district would increase. This phenomenon of racial differentials in the proportion of school-age children per geographical area resulted in the overcrowding of school facilities within the pre-existing boundary lines. The Board's consistent response to this situation was the restriction or "compression" of boundary lines, often accompanied by an expansion of facility capacity through such techniques as the building of additions and the utilization of substandard classrooms. This pattern of boundary compression and facility expansion had the inevitable effect of confining and containing the disproportionately large growth in black pupil population within the borders of the newly black neighborhoods. By compressing boundaries and expanding facilities, the Board kept black pupil population from "spreading" to the rest of the city and correspondingly increased the concentration of black pupils in Central City schools and the degree of racial imbalance in the system as a whole.

This compression phenomenon is illustrated by the experience of Washington High School. During the period, Washington was fed by Peckham and Steuben Junior High Schools. Peckham in turn was predominantly fed by Clarke, Auer, and other elementary schools located west of 27th Street. There were few blacks in the cluster's schools. During the mid-1960's, white residents moved out of the area around 27th Street and black residents moved in.

During 1970, the Board redistricted the Washington High School (12.3%B, 1969-70) cluster feeder pattern, allocating a western portion populated almost exclusively by white residents (herein referred to as "the panhandle") to the Marshall High School district (2.03%B). The cluster's grade structure was also reorganized by having all 9th graders in the district attend Washington High School rather than the junior high schools. The feeder pattern boundary change was ostensibly accomplished in order to alleviate overcrowding at Washington High School. Among the reasons given for choosing the "panhandle" area (which consisted of the 81st and 95th Street Elementary Schools) was that it was the closest area in the Washington district to Marshall High School.

Although the racial consequences of this redistricing were foreseeable by the Administration and Board members, they assert that strong educational reasons supported the actions taken. Regular school organization was cited, as the 81st and 95th Street Elementary Schools were the only elementary schools feeding into Wilbur Wright Junior High School whose students did not also go on to Marshall. Board policy has been that all elementary schools feeding into a given junior high school should, in the interests of peer relationship and educational program continuity, feed into the same high school. The Board also noted a "long standing" community belief that 95th Street Elementary School would feed into Marshall when the latter was built.

In the fall of 1970, following redistricting, there were approximately 2,000 white and 500 black pupils at Washington High School (20%B). By the fall of 1972, white enrollment had dropped to 1,400, and black enrollment was up to about 950 (38%B).

D. *Facilities*

1. *School Construction, Building Additions, and Modernization*

Historically, the neighborhood school policy, together with the pattern and timing of residential development in various areas of the system, has been determinative of when and where new schools were constructed; i. e., school building construction has been tied to the historical pattern of residential growth within the system. Hence, the older school buildings in the system are in the older Central City area. Conversely, most new schools have been located in the developing residential areas on the outer periphery of the city. In these areas, whose annexation in the years between 1950 and 1969 nearly doubled the city's area, the neighborhood school policy dictated that new schools be created so that children in these areas could attend schools of appropriate sizes and within reasonable walking distances.

While the newly annexed areas of the city were receiving new schools and new school districts to handle their rising student populations, the Central City was faced with problems which, although similar, were presented in a different context. There, school facilities within reasonable walking distances of the students' residences existed in each school district. The problem of providing adequate space and structures to handle the rapidly increasing pupil population density in the districts arose in the context of higher land and construction costs and reduced site availability. Inadequate older structures which could not be economically and satisfactorily remodeled were replaced if the need for a school was projected to continue, or were abandoned if no longer needed. Schools which were structurally sound and could be economically remodeled were modernized.

The primary goal of the remodeling/modernization program, approved early in 1958 by the Board, was to bring

structurally sound older schools which were still needed in their neighborhoods up to standards deemed presently current and appropriate in terms of changing program needs and changing lighting, acoustic, and furniture standards. Modernization costs were considerably less than costs for new construction but provided efficient and economical building use for a comparable number of years. Further, time was an important factor, and modernization could be accomplished more quickly than new construction.

Building additions, rather than replacement schools or additional new schools, were constructed in accordance with existing and projected long term and temporary space and student needs, considering such factors as the amount of playground space which would be consumed by an addition at the existing school site, the resulting size of the school after the addition, the kinds of programs which could be offered at the school, and the educational effects upon the students. The construction of an addition sometimes involved a concomitant temporary boundary change to handle overcrowding, and additions often contained a little extra capacity to meet expected needs with respect to surrounding districts.

The construction program engaged in during this period was financed pursuant to school bond issues and the construction fund tax levy, with the bulk of the funds coming from the former source.

During 1950-64, 135 major construction projects costing $90 million were completed in the system, including 44 new schools (34 elementary, 7 junior high, and 3 senior high), 67 additions to or alterations of existing structures, and 20 building modernizations. The 1966-70 five-year program included construction of 17 new schools, replacement of 5 schools, 13 additions, and 20 modernizations. The total cost was $45,745,000.

During this period, the Administration and its department of school housing resources gathered pertinent population and student data in order to plan for the long-term student housing needs of the system's pupils. The Administration's planning personnel during this period utilized, among other information, data contained in United States census reports, information concerning real estate development, student enrollment data, and data concerning urban renewal programs, the planning and development of parks, playgrounds, expressways, and off street parking lots. Among the census data considered was that relating to the age distribution of persons residing in certain census tracts. This data was utilized to predict future numbers of school-age children in the residential areas served by the system's schools, but was not used with respect to boundary changes. The data indicated that black residents tended to have a disproportionately large number of preschool and school-age children, and that relatively more black residents were of child rearing age. Recognition of these markedly different census data patterns of black and white residents enabled the Administration to understand one of the primary causes of the increased enrollment in those schools serving black residential areas, and to predict which schools would experience rapid growth in the future.

The basic Board-Administration policies and practices during this period have resulted in a disproportionately large number of elementary and secondary schools whose student bodies are predominantly nonwhite having older initial buildings; i. e., the first building that was constructed which is presently used by that school. The initial buildings in the elementary schools which were 90% or more nonwhite in 1968 averaged 71.8 years of age, while the initial buildings of elementary schools which were 90% or more white averaged only 33 years of age. As of 1968, the average age of the initial buildings of schools which had classroom additions after 1950-51 ranged from 75 to 84 years for the schools

which were 10-33%, 33-50%, 50-67%, 67-90%, or 90-100% black, but the average age for the initial buildings of such schools which were 90% or more white was only 23 years. As of 1968, three-fifths of the majority white secondary schools' initial buildings were less than 40 years old, while only one-third of the majority black secondary schools' initial buildings were less than 40 years old. Further, 42 out of the 86 elementary schools which were 90% or more white in 1968 had buildings constructed after 1950, whereas 15 of the 16 elementary schools which were 90% or more nonwhite in 1968 had initial buildings constructed before 1950. The evidence does not establish what the situation has been during the period from 1968 to the present.

The range of ages of the various school buildings utilized throughout the city varies substantially – from buildings constructed in 1864 to the ones presently under construction. The bulk of the new construction occurred in the 1950's to meet rapidly increasing numbers of students in the system. Of the 17 secondary schools built before 1950, 12 were more than 67% white as of 1968, and 10 were more than 90% white. Of the 14 secondary schools built after 1950, 11 were 90% or more white, 1 was 67-90% white, 1 was 33-50% black, and 1 was 90-100% black as of 1968. Hence, although many of the oldest secondary schools in the system are predominantly white, most of the more recently constructed secondary schools are predominantly white, and the predominantly black schools are older on the average.

As of 1968, of the 27 elementary schools in which initial buildings were built before 1900, 11 were 90-100% black, 3 were 67-90% black, 1 was 50-67% black, 1 was 10-33% black, and 11 were 0-10% black. Of the elementary schools in which initial buildings were built before 1950, 44 were 0-10% black, 3 were 10-33% black, 1 was 33-50% black, 2 were 50-67% black, 7 were 67-90% black, and 15 were 90-100% black. Of the 48 elementary schools in which initial

buildings were constructed after 1950, 42 were 0-10% black. As a result, in 1968 the average age of the initial buildings in the predominantly white elementary schools was much less than the average age of the initial buildings in the predominantly black elementary schools.

This relative disparity in the average ages of the initial buildings in the schools with predominantly black and predominantly white student bodies exists because most of the more recently constructed initial buildings are in schools serving and located in residential areas that are predominantly white. Most new schools have been created on the outer periphery of the city during the last 15 years because the need for entirely new schools (as opposed to additions) has been greatest in these areas where the largest quantum of new residential construction has taken place. In contrast, population growth created an initial need for schools much earlier in the older central areas of the city; as a result, the schools in this area were built first, and are consequently older than those buildings constructed on the periphery at a later date to meet a later need.

2. *Playground Space*

Plaintiffs proved that playground space measured upon a 1967-68 per assigned pupil basis was generally substantially less in the predominantly black elementary schools than in the predominantly white elementary schools. The evidence does not establish in detail what the playground space situation has been during 1967-68 to the present, or what it was in secondary schools at any time. The evidence does not establish what the schools' racial percentages were at the time that their construction plans (including planned playground space) were adopted by the Administration and the Board.

The aforesaid disproportionality existed because (a) most blacks resided in the older portions of the city and

attended predominantly black neighborhood schools which had greatly increased student enrollments, (b) the predominantly black schools have older sites located in the more residentially and commercially developed portions of the city where land has not been available during this period, and (c) playgrounds for these older sites were initially designed pursuant to standards calling for less playground space than standards presently prevalent or prevalent at a time before any additions had been built to handle increased enrollments. In contrast, the newer schools in the peripheral and predominantly white areas have playgrounds planned under the more generous current standards and make allowance for potential future population growth.

3. *Substandard Classrooms*

"Substandard classrooms" were defined as classrooms which for any reason failed to meet state and city building code requirements, disregarding government granted variances approving use of such rooms for classroom purposes. Plaintiffs proved that during 1953-54 through 1965-66, the number of substandard rooms being used in the elementary schools which were 33% or more nonwhite was greater, to a "statistically significant" degree, than the number of substandard rooms being used in elementary schools which were less than 33% nonwhite. The evidence does not establish that any such differences were "statistically significant" prior to or after this period or what the situation was at any time with respect to secondary schools. Nor does the evidence establish that during the aforesaid period there were any disproportionalities in the number of substandard classrooms utilized in predominantly nonwhite schools (90-100%) as compared to predominantly white (0-10%) schools.

Most of the substandard classrooms were in older schools and most were basement rooms; i. e., those which failed to satisfy the building code requirements existing during a portion of this period merely because they were more than 2½ feet below ground. Generally, these rooms averaged 715 to 1,200 square feet, had fluorescent lighting, satisfied building code fresh air requirements, and were little different from other classrooms in the same building.

Substandard classrooms were utilized in various schools during earlier portions of this period because the rapid increase in student enrollment created serious needs for space to house students, and because the Board and Administration wished to avoid half day shifts, higher student-teacher ratios, and increased bussing. The aforesaid disproportionality reflects the fact that during the late 1950's and the 1960's, much of the rapid pupil increase occurred in the older Central City school buildings which had basements, and that most of the schools having substantial percentages of black students were in these buildings.

Since the end of rapid increases in pupil population, few substandard classrooms have been used in any schools in the system. At present, there are only about a dozen classroom variances in process or outstanding. For the most part these variances concern the installation of approved delayed fire alarm systems and the limited use of transportable classrooms at Auer Avenue school and elsewhere because of isolated overcrowding.

The evidence establishes that Board or Administration acts or omissions concerning the creation of new schools, the modernization of existing schools, the construction of additions to existing schools, and the reopening or leasing of schools contributed substantially to the present student body racial percentages in the predominantly black schools. Schools presently having student bodies 70% or more

nonwhite are the result of the interaction of the neighborhood school policy and present racial residential patterns.

The Board and the Administration, in adhering to and carrying out the neighborhood school policy, acted with the knowledge that the total effect of their actions in furtherance of that policy would be the segregation of black and white students in separate schools. Board and Administration determinations concerning site selection, building additions, school size, and district boundaries, among others, were made with the knowledge of their racial effect because there was general knowledge as to the racial characteristics of neighborhoods affected by such decisions. The evidence established that with respect to any such decision, alternatives were available which would have resulted in schools which are presently predominantly black having substantially lower proportions of their students nonwhite. However, these alternatives were not consistent with the neighborhood school policy and, consequently, were not adopted.

E. *Bussing Programs*

During the 1950's and early 1960's, the peripheral areas of the city had school districts encompassing large areas, and it was necessary to bus students to school because of the great distances between their residences and the school. As population density in these areas increased, additional schools were built with the concomitant result that students traveled shorter distances to get to schools, and in many instances bussing ceased to be necessary. In the central portion of the city where population density was always high during this period, the school districts were relatively small, and students could generally walk between their residences and schools. Bussing was seldom necessary until the modernization program was embarked upon and overcrowding began to develop in the 1960's.

The basic policies and practices were that bussing would take place because of excessive distance (student residence more than two miles from school), unusual hazard (e. g., no sidewalk or shoulder along roadway), to attend exceptional educational programs (interrelated language skill center), to alleviate conditions of overcrowding, the lack of a school facility within the district, to accomplish modernization, and for participation in athletic events and intramural sports activity. The Board claims that it never was Board policy to bus students in order to promote "racial goals" or to consider race in making determinations.

The system's total transportation expenditures are over two million dollars per year. During 1972-73, the gross cost of transporting regular pupils was $736,970 for both public and private students ($575,986 for public students). Total state aid amounted to $105,774 ($21,852 for private students). Transportation expenditures with respect to public exceptional education was $1,050,444 with 70% thereof being covered by state aids. Transportation expenditures with respect to private exceptional education was $269,269 with state aid amounting to $69,306. There was no federal reimbursement for any transportation costs.

During 1973-74, the Administration contracted for 291 vehicles which traveled 326 daily routes transporting about 11,000 pupils to and from 128 public schools and 45 nonpublic schools, traveling a distance of about 1,864,300 miles.

Bussing for overcrowding and modernization purposes occurred primarily in the Central City schools because of the Board and Administration commitments to the modernization program for older schools and reduction of class sizes, a reluctance to use educationally inferior rooms and special facilities for classroom purposes, and a commitment to full-day educational programs rather than

shifts. Board policies and Administration practices with respect to overcrowding were (a) to utilize facilities within the neighborhood district whenever practicable because of the neighborhood school policy and cost considerations, (b) to use bussing only as a nonpermanent measure whenever practicable to alleviate temporary overcrowding, and (c) change class groups, students, and teachers every semester or year so as not to put the bussing burden on the same persons for extended periods of time.

From 1950 to the present, two different procedures have been utilized with respect to the relationship of bussed students to the receiving school. Prior to 1971, the basic Board policy and practice was to bus students via the "intact" class method if the particular students involved would not be bussed to the receiving school for more than one year. The "mixed" student method was utilized if the particular students were to be bussed for more than one year and assigned to the receiving school upon a permanent or indefinite basis.

Under the "intact" method, entire classes assigned to the neighborhood district school would be bussed with their teachers to another school or schools and kept "intact" therein as classes. Although children in these classes might mix with other students at the receiving school during recess periods, lunch programs, and school assemblies, they were not otherwise integrated into the structure of the receiving school. Under the "mixed" method, students from a neighborhood district would be assigned to the receiving school (i. e., transferred thereto) and be considered as part of that school's student body in the formulation of the receiving school's classes; i. e., the transferred students would be "mixed" with the receiving school's students in the various classes at that school.

The Board considered intact bussing to have certain advantages. It could be accomplished flexibly during irregular

time periods not amounting to one full semester or one full year. It was economical because bussing expenditures would be made only for the actual period that bussing was necessary. It was efficient because the records in Administrative control could be maintained at the neighborhood school with no need to reshuffle records at the receiving school, making them less accessible to parents of the bussed students. It was deemed to have educational advantages because it avoided the necessity of reorganizing classes in the middle of a semester's program, thereby obviating the destruction of the continuity of a semester's educational program which the changing of teachers would involve. By staying with their neighborhood school teacher and utilizing the neighborhood schools instructional materials and equipment at the receiving school, pupils remained in constant and direct contact with a teacher familiar with and experienced in meeting their individual educational abilities and needs.

When bussing was provided because there was no school in the district in which the children resided, the bussing was always "integrated" or "mixed" because the students were assigned permanently to the school to which they were bussed. Bussing for this reason occurred only in schools of the 0-10%B category, there being no districts in the Central City which did not have schools located therein. Bussing provided because a district school lacked sufficient classroom space was always intact because the students were only being bussed upon a temporary basis (not over one year) and were not permanently assigned to the receiving school. Bussing for this reason occurred primarily from schools in the 0-10%, 67-90%, and 90-100% categories. When bussing was provided because of remodeling or "modernization," it was always intact because the students were only bussed upon a temporary basis (not over one semester) and were not permanently assigned to the receiving school. It occurred from schools in all categories. When bussing was provided

because of difficulty of access to facilities (primarily because of the excessive walking distance), it was always integrated or mixed because it was on a continuing and area basis, and the students were permanently assigned to the school to which they were bussed. Bussing for this purpose did not occur with respect to schools located in the black Central City schools because students generally resided within easy walking distances of their district schools. When bussing was provided pursuant to petitions from parents (primarily for safety reasons), it was always integrated because of its indefinite duration and the permanent assignment of such students to the receiving school.

Because of the aforesaid policies, practices, and factual circumstances, bussing from the black Central City schools was disproportionately on an intact basis as opposed to integrated or mixed during 1950-1969. A disproportionate percentage of the integrated bussing involved students assigned to schools in the 0-10%B and 10-33%B categories because the purposes for which this type of bussing was utilized occurred most often with respect to such schools (e. g., no school in district, excessive walking distances to the schools, walking safety hazards). Such needs did not occur with respect to schools located in the central area because these districts had schools within reasonable walking distances for the students.

During this period, the bussing of particular students because of overcrowding or modernization generally lasted for less than one year. The basic policy was always to bus and to contract for bussing only for the period necessary. The policy was adopted in part because of cost considerations and the educational benefits deemed to flow from the neighborhood school policy. Modernization never rendered classrooms unavailable for more than one semester and generally ended in the middle of the semester. Transporting for overcrowding purposes occasionally was started and

shortly thereafter terminated when it became apparent that student enrollment projections had been inaccurate. Similarly, bussing for purposes of relieving overcrowding would be terminated in the middle of a semester if the building of a classroom addition was then completed. Designation of receiving schools was on a temporary-type basis and could and did vary between semesters because of changes in classroom availability.

Generally, with certain exceptions, bussing for overcrowding from a school lasted only for a few semesters. Among the exceptions were the following elementary schools which tended to be predominantly black.

Elementary School	Time Period	No. of Pupils Involved	Percentage Range of Black Students
Auer	1966-67 to 1969-70	60-600	56.53-89.27%
Berger	1965-66 to 1972-73	30-540	77.87-97.7%
Brown	1962-63 to 1966-67	105-206	67.00-93.91%
Clarke	1966-67 to 1971-72	64-300	39.81-79.94%
Elm	1963-64 to 1967-68	61-360	9.3-55.46%
Emerson	1963-64 to 1968-69	35-140	0.96-2.37%
Engelburg	1958-59 to 1959-60 and 1966-67 to 1968-69	20-106	0.00-0.93%
Franklin	1968-69 to 1972-73	60-150	90.86-98.17%
Green Bay	1966-67 to 1972-73	30-150	67.87-98.27%
Keefe	1963-64 to 1971-72	32-288	94.12-99.52%
Lloyd	1963-64 to 1966-67	30-66	99.16-98.68%
Siefert	1963-64 to 1965-66	30-99	94.09-97.08%
Twentieth	1960-61 to 1965-66	40-210	70.5-97.7%
Twenty-first	1964-65 to 1969-70	33-150	82.1-97.85%
Walnut	1963-64 to 1966-67	26-30	50.72-71.54%
Whitman	1962-63 to 1968-69	34-114	0.00-12%

Pupils bussed for purposes of overcrowding or modernization were returned to their neighborhood school during the lunch hour, even at times when lunch facilities were available at the receiving school.

In August 1971, the basic policy concerning intact bussing was amended by the Board to provide that if the bussing of particular students was not planned to last one year or more, it would be the "intact" method; if planned for one year or more, the mixed method of bussing was to be used.

From 1958-59 through 1962-63, a total of 8,241 pupils were bussed intact from black Central City schools in 23 instances of bussing lasting a semester or less; 1,002 were bussed for overcrowding during 11 of the instances, averaging 91.09 pupils from each school per semester, and 7,239 were bussed for modernization in 12 instances, averaging 603.25 pupils from each school per semester.

In the peripheral area schools, there were a total of 7,882 pupils bussed intact during this same period in 24 instances of semester (or less) bussing; 1,690 pupils were bussed for overcrowding during 12 instances, averaging 140.83 pupils per school per semester, and 6,192 were bussed for modernization in 12 instances, averaging 516 pupils per instance.

From 1963-64 through 1967-68, a total of 12,482 pupils were bussed intact from black Central City schools in 74 instances of semester (or less) bussing; 7,905 pupils were bussed for overcrowding during 67 instances, averaging 117.98 pupils per instance; and 4,577 pupils were bussed for modernization during 7 instances, averaging 653.8 pupils per instance.

In peripheral area schools, there were a total of 7,709 pupils being bussed intact during this same period in 44

instances of semester (or less) bussing; 3,735 pupils were bussed for overcrowding involving 36 instances, averaging 103.75 pupils per instance; and 3,974 pupils were bussed for modernization in 8 instances, averaging 496.7 pupils per instance.

From 1968-69 through the time of trial, there was no bussing for modernization in the black Central City schools and only 1 instance of such bussing (640 pupils) in the peripheral area. In the system as a whole, a total of 8,405 students were bussed for overcrowding during the same period; most of this bussing was from schools with high black racial percentages. During 1970-71 to 1972-73, there were about 900-1,364 students (about 1% of the system's total enrollment) being bussed for overcrowding each year to about 15 receiving schools. In 1973-74, it dropped to 600, the lowest since 1964-65. Bussing for overcrowding during 1972 to the present has been mixed rather than intact.

During 1958-59 through 1973-74, there were a total of 509 instances of bussing from one school to another because of overcrowding or modernization. Of these 509 instances, 214 (42%) involved movements between schools of about the same student body racial compositions, 51 between basically black student bodies, and 163 between basically white student bodies. There were 289 instances (56.7%) which involved movements from schools whose racial percentages were substantially different: 9 involved movements to schools with substantially greater black percentages, and 280 involved movements to schools with substantially lesser black percentages. Six (1.3%) of the instances of bussing involved transportation to special schools.

F. *Student Transfer Policies*

Historically, the Board has had two transfer policies under which students could voluntarily transfer from their

neighborhood schools to the other schools in the System. These were the "free transfer policy" ("Free Transfer") which was adopted as early as 1947 and continued until 1964, and the "open transfer policy" ("Open Transfer") which was adopted in 1964 in response to requests by the NAACP and other civil rights groups. The only substantial difference between the "free" and "open" procedure was that under the latter, unlike the former, applications need not state a reason, and generally no member of the Administration makes a judgment as to whether the requested transfer would be in the best interest of the student.

Under the Free Transfer procedure (1) the reason therefor was stated on the application, (2) thereafter the principals of the losing and receiving schools would be contacted and the reasons would be discussed, and (3) if both approved, available space existed in the receiving school, and there were no reasons why the transfer should not be made, the central office would automatically issue the transfer permit. If either or both of the principals were opposed to the transfer, then the final decision was made by the assistant superintendent and/or his designee in the Central Administration. This decision was made after extensive review of the student's situation, including conferences with the parents and/or pupil in which the pertinent reasons would be discussed in depth. The controlling consideration was whether there were any reasons why the requested transfer should not be granted in terms of the best interests of the student in light of such factors as program adequacy, the distance involved in going from home to school, validity of the stated reasons, and the availability of space in desired classes. These determinations were not based upon the race of the student and/or the student body racial composition of the losing and/or receiving schools, as race, religion, or national origin were not considered to be valid reasons for requesting a transfer.

Under the Open Transfer procedure (1) the transfer application would generally be automatically approved by the Central Office if there was available space at the receiving school, (2) all denials were the result of the lack of available room, and (3) first priority was given to pupils residing in the district who wished to attend their neighborhood school.

Under both procedures (1) a transfer once issued to a student was permanent in the sense that it need not be renewed each year, and (2) transportation was not provided by the system. Board policy and Administration practice has been to follow a first-come, first-served basis with priority determined by the time stamped on the transfer application when it was filed with the Central Office.

The procedures under both the Free and Open Transfers were that prior to May 1 and December 1 of each year (i. e., near the end of the school year and prior to the beginning of the second semester, respectively), the principals of the schools in the system would indicate their projected enrollments for the coming semester. If there was available room in a particular class after school commenced, transfer applications would thereafter be granted to fill the spots available therein.

During the early 1960's, a number of civil rights groups in the community suggested that the opportunities for students to transfer from one school might be enhanced by eliminating the requirement of having a reason therefor. In 1964, Board member Golightly (who is black) and the NAACP made such a proposal. It was argued that affording students an opportunity to choose to attend schools located outside their residential neighborhoods would lead to racial integration in the system's schools. The Board adopted the Open Transfer proposal upon the recommendation of the Committee on Equal Educational Opportunity, then chaired by member Story.

During the early 1960's, open enrollment plans were considered by some to be a means of accomplishing desegregation. Time proved them wrong. While Open Transfer policies have been denominated methods of desegregating schools, experience with human behavior in this country indicates they are not very successful in accomplishing this result. This procedure has not been utilized by sufficient black students transferring to predominantly white schools to eliminate predominantly black schools or otherwise achieve anything akin to racial balance in the system's schools, and it proved to be an open invitation to white students to flee from black schools.

The incidence of transfers among secondary students is suggested by the following figures: During 1967-68, there were 4,032 applications, of which 3,300 (81.9%) were granted; during 1968-69, there were 4,570 applications, of which 3,727 (81.6%) were granted; during 1971-72, there were 3,861 applications, of which 2,814 (72.9%) were granted; during 1972-73, there were 4,327 applications, of which 3,522 (81.4%) were granted. During this period of time the system's total secondary school enrollment was approximately 45,770. Thus, during each year the number of transfers granted averaged 7.39% of total secondary enrollment. This statistic, however, does not truthfully represent the total impact on the secondary system because of the fact that the transfers granted were permanent in nature; i. e., once granted, they did not have to be reviewed or otherwise renewed in following years. The cumulative transfer effect was thus greater than the foregoing statistics might suggest.

During the period 1950-68, for example, the evidence established that voluntary transfers were a factor substantially affecting the percentage of nonwhite students at the following schools during the following years:

(a) During 1961-62 through 1967-68, King High School's enrollment was about 2,028, and its student body racial percentage went from about 10-33%B to 76.54%B. There were generally in excess of 100 white students and approximately 25 to 50 blacks students transferring out each year. During 1961-62 through 1963-64, there were about 50 black and 140 white students transferring in per year. During 1964-65, there were 64 black and 54 white incoming students; from 1965-66 through 1967-68, the number of students transferring in was insubstantial.

(b) During 1961-62 through 1967-68, North High School had an enrollment of about 1,450, and its student body racial percentage was in the 90-100% category. Each year it had substantial numbers of both black and white students transferring out, ranging from about 300 students per year (about 150 white and 150 black) to about 175 students (145 black and 30 white) near the end of this period. During the earlier portion of this period, there were substantial numbers of black students transferring in but never substantial numbers of white students. Near the end of this period, the number of students transferring in became insubstantial.

(c) During 1961-62 through 1967-68, Fulton Junior High School had an enrollment of about 1,221, and its student body racial percentage was always in the 90-100% category. During this period the total number of students transferring out ranged from 100 to 140 pupils per year, with the number of white students ranging from about 50 to 100 per year, and the number of black students ranging from about 50 to 65 per year. During this period the number of students transferring into Fulton Junior High School was never substantial.

(d) During 1961-62 through 1967-68, Roosevelt Junior High School had a total student enrollment of about 931,

and its student body racial percentage was always in the 90-100% category. Each year there were about 150 to 175 black students transferring out and about 15 to 30 white students transferring out. During this period the number of students transferring in was never substantial.

(e) During 1961-62 through 1967-68, Wells Junior High School had student enrollments of about 1,136, with its racial percentage going from about 33-50%B to 57.47%B. During the first three years of this period, there were an insubstantial number of black students transferring out and about 175 white students transferring out each year. During the last four years of this period, there were about 35 black students transferring out and in excess of 200 white students transferring out each year. During the first three years of this period, there were generally in excess of 80 black students and 50 white students transferring in each year. During the last four years, there were generally about 90 black students and about 25 white students transferring in each year.

(f) During 1957-58 through 1967-68, Berger Elementary School had student enrollments of about 686, with its student body racial percentage going from 1-10%B to 88.24%B. From 1962-63 on, there were generally about 20 black and 30 to 40 white students transferring out each year. During the first few years of this period, there were about 20 to 25 white students transferring in each year. Other than this, the number of transfers in were insubstantial.

(g) During 1957-58 through 1967-68, 4th Street Elementary School's student body was about 465, with its student body racial percentage being in the 90-100% category. During 1957-58 through 1967-68, there were an insubstantial number of students transferring out each year. During the same period, a substantial number of black students transferred in each year. The number of white students transferring in was insubstantial.

(h) During 1957-58 through 1967-68, Keefe Elementary School had student enrollments of about 950, with its student body racial category going from 10-33%B in 1957-58 to 98.59%B in 1967-68. Prior to 1961-62, when the school was in the 67-90% category, the number of black students transferring out was insubstantial. At that time, however, there were in excess of 30 white students transferring out each year. During the last six years of this period, there were in excess of 20 black and 10 white students transferring out each year. With respect to incoming transfers, after 1962 there were not substantial numbers of students involved. During 1957-58 through 1959-60, there were generally about 25 to 30 white students transferring in each year. During the next two years, there were generally around 15 black and 20 white students transferring in each year.

G. *Personnel Practices*

1. *Teacher Hiring*

During the early and mid-1960's, teachers were in short supply in this country. The system had an intensive recruitment program throughout the United States, but competition from other school systems in the United States was keen. Rapidly expanding student populations in the system during these years increased the demand for additional teachers. The shortage was greatly alleviated around 1969 and 1970.

Since at least the early 1960's, the Administration's policy and practice has been to put heavy emphasis upon increasing the number and percentage of minority employees, particularly teachers, principals, and administrators. Relatively small numbers of black teachers graduate from Wisconsin schools of education, so geographically expansive recruitment was necessary. The intensification of the

recruitment program included sending recruiters to the southern and eastern portions of the United States where there were colleges and universities whose students were predominantly black. The number of blacks on the system's recruiting staff was increased from 1 to 11 or 12. Particular emphasis was placed upon increasing the scope of recruiting advertising so as to utilize advertising media which reaches minority groups.

During the early 1960's, the minority recruiting program was only moderately successful. A number of black teachers were hired but not as many as the Administration would have liked. For example, during 1967-68, there were 120 elementary schools in the system and 380 nonwhite elementary teachers. Hence, if they had been equally divided among the schools, there would only have been slightly more than 3 nonwhite teachers per school.

There has not been utilization of different standards with respect to black teachers but rather a commitment to ensuring that every consideration is given black teachers. There has been a high level of competition in the country for qualified black teachers. It has been particularly hard for the system, since most of the recruiting had to be accomplished out of state against local competition there. Local recruiters (e. g., Oklahoma, Tennessee, and Ohio) were often more successful to the extent that black teachers preferred to remain relatively near their homes.

The intensification of the minority recruitment program has resulted in significant progress, although Administration goals (which do not include any quotas) have not yet been reached. Presently upwards of 15% of the system's teachers (about 800 of 5,700-5,800) are black, upwards of 15% of the principals and administrators are black, and a substantial percentage of the school aides are black. This has been due in part to the increasing number of black graduates qualified in

education during recent years as well as the increasing number of blacks who hold advanced education degrees.

In the fall of 1969, 682 new teachers were employed, and of these 60 were black (8.5%). For the second semester 1969-70, 27 of the 142 new teachers (19%) were black. For 1971-72, 333 black teachers were interviewed and/or submitted applications, and of these 69 were employed. For 1972-73, the system hired 494 new teachers, 80 of which were black (16.2%).

2. *Substitute Teachers*

Substitute teachers are teachers who take over a class when a regular teacher is absent for any reason. The evidence does not establish that the substitute teachers utilized during the period were ever of inferior ability and/or quality as compared to regular teachers.

During recent years, one goal of the Administration has been to eliminate the system's use of long-term substitute teachers. The aforesaid goal was largely attained by 1970 when there was an ample supply of teachers in this country. The substitutes on long-term duty in the spring went from 50 in 1969 to 3 1/3 in 1970 to 11 in 1971. The substitutes on long-term duty in the fall of 1969, 1970, and 1971, respectively, went from 82 to 9 to 12. As a result of the abundance of teachers, over two-thirds of the present substitute staff consists of fully certified teachers.

During 1967-68, those elementary and secondary schools whose student bodies were 50%B utilized relatively more substitute teacher days (40% of the system's total) as a proportion of the total teacher days utilized (25%). Those elementary schools whose student bodies were 33-67%B or 67-90%B utilized relatively more substitute teacher days than did those elementary schools whose student bodies were

90-100%B. The elementary and secondary schools whose student bodies were 90-100%B utilized approximately 14% of the total teacher days and 22% of the total substitute teacher days, whereas the schools whose student bodies were 0-10%B utilized 66% of the system's teacher days and 50% of the substitute teacher days. The evidence does not establish that the aforesaid pattern was anything but a reflection of the pattern of regular teacher absences among the system's schools during those years.

The evidence does not establish what the situation was in the aforesaid respects either before or after 1967-68.

3. *Teacher Placement*

During this period the basic Board policy and Administration practice with respect to placement of teachers within the system's schools has been (a) to make certain priority assignments (i. e., excess teachers from schools whose student enrollment fell, teachers returning from illness leave, and teachers involved in an administrative move such as on principal recommendation due to difficulty in prior assignment); (b) to next fill the remaining vacancies to the maximum extent possible from system teachers upon a seniority basis that gives no consideration to race; and (c) to then hire to the maximum extent practicable sufficient additional teachers to fill remaining vacancies and assign each of these teachers to a vacant teaching position. Since at least the late 1960's, these priorities have been required in the teachers' collective bargaining agreement. These policies and practices were uniform throughout the system.

All personnel (e. g., teachers, administrators, principals) new to the system, whether just out of school or from another system, go through a three-year probationary period. After three years they are tenured. Since most of the system's black teachers have been hired only during the last

few years, most of them are relatively low on the seniority list. This makes it unlikely that most minority teachers can at this juncture transfer to the schools and positions deemed most desirable among teachers. This situation will change in the years to come as the minority teachers achieve greater seniority.

During the period, the basic policies and practices with respect to assignment of teachers newly hired by the system have been as follows: Each is assigned to one of the vacancies they are licensed for which exist after the system's seniority transfer procedure has been completed. Assignments are pursuant to an Administration determination as to what position each teacher is deemed most qualified for and in which his/her educational contribution will be maximized. Among the factors considered are (1) staff profile, balancing goals including ethnicity, education, experience, sex, age, and geographical background; (2) teachers' desires, it being deemed that happy teachers perform best and/or are more likely to stay within the system; (3) teaching experience, and (4) personal background (including racial or ethnic considerations to the extent this relates to teachers' cultural backgrounds).

During most of the period, the scarcity of qualified teachers caused the Administration to generally honor teachers' personal needs and desires concerning initial assignment. During recent years, new teacher preferences with respect to geographical location of school assignments have not been as important as during the era of teacher shortages when the system had to give virtually overriding consideration to such preferences or lose the teacher.

Since around the mid-1960's, the Board policy and Administration practice has been to profile its teachers, principals, and administrators insofar as this is practicable and educationally desirable. One aspect of the profiling

policy has been an endeavor to build integrated staffs in the schools with predominantly black student bodies, as well as in those schools in the outer portions of the city that have predominantly white student bodies. During recent years, the Administration has many times attempted to persuade black and white teachers not to transfer out of a given school when this would harm the balanced racial profile at that school.

During this period, it has not been the Board's policy or the Administration's practice to attempt to compel teachers to stay in the Central City Schools. If a teacher cannot cope with problems in a school or feels uncomfortable there and wants to transfer out when an appropriate opening occurs elsewhere, he/she has been permitted to do so. Teacher collective bargaining agreements have generally barred involuntary reassignments absent a sufficient reason therefor established after an arbitration type hearing and decision. When the teachers' collective bargaining agreement was renegotiated in 1973, the Board and Administration took a strong position about regaining some of their teacher assignment rights which had previously been limited by the collective bargaining agreements. During the final stages of negotiation, they concluded that teachers would have struck to prevent insertion of such provisions in the contract, and the agreement eventually approved did not contain any such alterations.

During this period, a disproportionately large percentage of teacher transfers and teachers leaving the system occurred at schools with higher percentages of black students, and transfers were generally to schools with lower percentages of black students. There have been a great variety of reasons for this pattern, but basically it has occurred in response to (a) the general feeling among teachers that teaching in those schools is more difficult because of (i) generally lower student achievement levels, (ii) lack of motivation among students, (iii) rapid changeover of students in classes resulting

in a lack of teaching continuity, (iv) greater disciplinary problems, (v) the difficulty white teachers have in effectively relating to and communicating with black students because of their differences in cultural standards, backgrounds, and experience, and (vi) a higher percentage of assaults upon teachers and of vandalism to staff autos; (b) distances that have to be traveled from the teachers' homes to the schools; and (c) ready availability of other teaching positions deemed more desirable, both within and outside the system.

The aforesaid types of problems existing in schools serving lower socio-economic areas were such that all teachers were not ready to or capable of dealing with them. On the other hand, some teachers have taught at schools having predominantly black student bodies for years because they came there initially pursuant to a desire to teach there, felt successful and had rewarding experiences, and enjoyed the students and the faculty. However, many of these teachers also eventually left for various reasons (e. g., opportunity for professional advancement or promotion, greater educational challenge). Another cause of the disproportionate number of teaching vacancies was the large increases in student population in these schools which resulted in large numbers of additional teaching positions becoming available there. In recent years there has been more stability in this regard.

During 1973, the overall teacher transfer pattern was that of white teachers transferring out of the schools with predominantly black student bodies. With respect to black teacher transfers during this same period, some were from schools with predominantly white student bodies to those with predominantly black student bodies. For example, as of September 1973, 8 of the 17 black teacher transfer requests were from schools in the 0-20% student body racial category to schools in the 81-100% category, while the remaining 9 were from schools in the 81-100% category to schools in that same category. Among the reasons given for these transfers

are shorter distances to be traveled from home to school, desire to help black students educationally and to upgrade the education in the latter schools, and a feeling that they can more successfully relate to and educate black students.

The evidence does not establish that during this period teachers said they were transferring out of the black schools because of racial prejudice or negative views toward black students. Rather, most teachers said they were transferring because of such nonracial reasons as lack of student motivation, verbal and/or physical abuse, lack of student achievement, or some other factor unrelated to the students (e. g., shorter distance from home to school). Those transfers asked for during 1972-73 did not contain any stated reasons that amounted to racial bigotry (e. g., an objection to a person because of his race as opposed to other nonracial characteristics).

The aforesaid policies and practices (primarily the seniority transfer procedure) resulted in most black teachers teaching in schools with predominantly black student bodies, and most white teachers teaching in schools with predominantly white student bodies. However, during this period most schools having student bodies with high black percentages (80-100%) generally had teacher populations that were about 50% white. At least since the late 1960's, there has been a conscious attempt by the Administration to raise the percentage of black teachers at those schools with predominantly white student bodies and to distribute black teachers and administrators throughout the system's schools insofar as practicable. There has never been any effort to keep black teachers from teaching in predominantly white schools.

In 1969-70, there were 31 black teachers in elementary schools with student bodies less than 10% nonwhite, and 11 in those schools in the 10-50% nonwhite category. One or

more black teachers were in 71 of the system's 127 elementary schools. During this year, there were 17 black teachers in secondary schools with student bodies less than 0-10% nonwhite, and 4 in those schools in the 10-50% nonwhite category. One or more black teachers were in 29 of the system's 33 secondary schools.

By 1970-71, there were 683 black teachers in the system, and 117 of the schools had integrated faculties, with all secondary schools having integrated faculties except for one junior high school. The lack of teacher turnover in some of the smaller elementary schools foreclosed any opportunity to assign black teachers thereto. Hence, there were still 38 elementary schools with all white faculities.

In 1972-73, there were 23 black teachers and 3 black administrators in elementary schools whose student bodies were less than 10% nonwhite, and 1 black teacher and 3 black administrators were in those schools in the 10-50% nonwhite category. One or more black teachers and/or administrators were in 75 of the system's 129 elementary schools (teachers in 73, administrators in 25). During this same year, there were 18 black teachers and 5 black administrators in secondary schools with student bodies less than 10% nonwhite, and 6 black teachers and 4 black administrators in those schools in the 10-50% nonwhite category. All of the system's secondary schools had one or more black teachers, and 21 of the 35 had one or more black administrators.

4. *Teacher Quality*

During this period, teachers in the system had to have at least a bachelors degree and an appropriate Wisconsin state teaching license. By 1971, all teaching positions were staffed with fully qualified, licensed individuals, the thrust of recruiting having changed from attracting numbers to a

qualitative selection as a result of an abundance of applications in every field of teaching.

Some Board members believe that (a) the system's teachers have a variety of abilities that differ from classroom to classroom, (b) there are some very competent teachers doing a very good job and some that are mediocre and not doing as well, and (c) overall, teachers are very dedicated, especially those in the schools that have been experiencing very serious problems.

The evidence does not establish the manner in which those teachers of below or above average quality are or ever were distributed throughout the system's schools, or that a disproportionate percentage of the less capable teachers are or ever were teaching in the schools whose student bodies are predominantly nonwhite, or that at the time of assignment there was any knowledge or way to know which teachers would prove to be below or above average quality.

If a teacher in any school, regardless of student body racial percentage, is deemed to be performing unsatisfactorily, the general policy and practice from 1958 to the present has been to get that teacher out of that school by transferring him/her to a different school or by seeking his/her resignation. This procedure is initiated by reviews of all teachers in the system by the principals of their respective schools with the ultimate determination being made by the Administration. Prior to 1971, only tenured teachers had a right to have the determination reviewed by the Board. After 1971, if any teacher objected to the Administration's determination, there has been a procedure of administrative review ending in binding arbitration.

The system has had a comprehensive program of providing supervisory-consultative expertise and assistance for teachers, particularly the newer ones. These supervisory

services are heavily concentrated in schools located in the Central City.

There have also been in-service training programs for teachers with respect to the best techniques of working with and motivating under-achieving students with lower socio-economic backgrounds. This program has been utilized in the Central City Schools to develop sound instructional techniques, educational programs and materials, and to help solve problems for those teachers working with low achieving students from lower socio-economic backgrounds.

Since the mid-1960's, the regular student-teacher ratios in schools located in the Central City have been lower than in the other schools in the system. During 1973, classes were on the average five pupils smaller in those schools eligible for Title I funds. Further, some schools, such as Washington and Fulton, having discipline, racial conflict, and low achievement problems have been provided with additional administrative staff and a disproportionately large quantum of special services including guidance counselors and special teachers (e. g., reading) in an attempt to eradicate these problems.

There are a disproportionately large number of school aides in those schools located in the Central City (e. g., the largest inner city schools have 10-20 full-time aides; some outer city schools have none). There are three types of aides: paraprofessional, technical, and general. They are hired to meet a particular school's needs and perform a variety of supplementary duties (e. g., maintain order, handle attendance matters). There is no formal education or experience requirements, although some of the paraprofessional aides are teachers. They are generally residents of the neighborhood, and their most valuable attributes are knowledge of the neighborhood and an ability to deal effectively with and understand the students. Hence,

there is a predominance of black aides in the schools serving predominantly black residential areas. There are about 2,000 aides in the system, most of whom only work part time.

Some Board members believe that while experience is not the sole criteria with respect to a teacher's ability to perform effectively, historically one of the primary problems in the Central City schools has been that a great many of the teachers there were just out of college. In the earlier portion of this period, the Board and Administration had no practical means of avoiding this. This pattern has changed in recent years.

During 1957-58 through 1967-68, the average and median experience (exclusive of experience outside the system) of teachers in elementary and secondary schools whose student bodies were 0-10% nonwhite were generally greater than that of teachers in the schools whose student bodies were 90-100% nonwhite. The average and median experience of teachers in the 90-100% nonwhite schools were generally 10 to 11 years and 6 to 7 years, respectively; the average for 0-10% nonwhite schools was 4 to 5 years greater, and the median for such schools was 2 to 3 years higher. During most of this period, the schools whose student bodies were 10-33% and 33-67% nonwhite had the highest average teacher experience. The evidence does not establish what the situation was in these respects during 1968-69 to the present.

The evidence does not establish that during this period there were any significant differences in the expenditures per pupil for teacher salaries between those schools whose student bodies were predominantly white and those schools whose student bodies were predominantly black, or that there was a direct relationship between such expenditures per pupil and the student racial percentage in the schools.

During 1967-68, the regular teacher salary expenditure per pupil was $261 in the elementary schools whose students

were 0-10% nonwhite as compared to $256 per pupil in the elementary schools whose student bodies were 90-100% black. The expenditures per pupil was $387 in the secondary schools whose student bodies were 90-100% black, as compared to $376 in the secondary schools whose student bodies were 0-10% nonwhite. The combined elementary and secondary school expenditures per pupil were $309 per pupil in those schools whose student bodies were 0-10% nonwhite as compared to $285 in the schools whose student bodies were 90-100% black.

The evidence does not establish what the total teacher salary expenditures were, as the salaries of substitute teachers were not included in the aforesaid figures. The schools with predominantly black student bodies consumed proportionately more substitute teacher days than did those with predominantly white student bodies, thereby requiring additional teacher expenditures. The evidence does not establish what the situation was in these respects in any other years during this period.

During the school years 1964-65 through 1967-68, the median salary of regular teachers in those elementary and secondary schools whose student bodies were 0-10% nonwhite was higher than that of teachers in schools whose student bodies were 90-100% nonwhite. There was no direct relationship between these salary medians and student body racial percentages. Such differences resulted in part from differences in the relative seniority of teachers in the system's schools at those times.

5. *Social Workers*

At present, there is 1 black supervisor and 14 black social workers out of 76 social worker positions. In 1963, 5 of 48 social workers were black. The Administration's basic policy and practice with respect to hiring social workers has

been to choose the person best qualified to fill the particular needs of a given position. If the position serves the needs of a particular minority group, the Administration will give weight to the fact that an applicant is a member of that minority group in the belief that he or she will have a greater understanding of the needs of the children involved, will experience better acceptance by the children in that group, and may serve as a role model with respect to those children. Though the requirements imposed upon social workers in various schools in the system are not different, the nature of the services to be provided have been more demanding in the Central City schools.

Social workers may request transfers under a system similar to that for teachers. The stated reasons on the applications have included a desire to advance professionally, to find greater professional challenge, to engage in a different or particular type of work, and feelings of ineffectiveness in working with black persons. The evidence does not establish that any of the transfers have been sought because of racial bigotry.

6. *Principals and Administrators*

The basic policy and practice with respect to principals and administrators has been to make assignments pursuant to relative needs, considering such factors as the size of the school and the number and severity of its problems. Those schools located in the Central City have received a substantially greater quantum of administrative type services.

During 1960-61 through 1967-68, relatively more "probationary" principals and administrators were assigned to those elementary and secondary schools whose student bodies were predominantly black than to those whose student bodies were predominantly white. A principal or administrator is classified as "probationary" if he/she has less

than three years' experience in such capacity within the system, regardless of the extent of his/her experience in that capacity outside the city system. Overall, a greater proportion of the schools with predominantly black student bodies were provided additional administrative help than those schools whose student bodies were predominantly white. There was no direct relationship between probationary principals and administrators and the schools' student body racial percentage.

The evidence does not establish to what extent this disproportionality was the result of the disproportionately large number of assistant principal and administrator positions available in those schools whose student bodies were predominantly black, or the transfer patterns of such personnel under the seniority provisions of the system's collective bargaining contract.

H. *The Impact of Socio-Economic Variables on Educational Achievement*

Children throughout the city come to school with variant abilities and willingness to learn, and also bring with them their own behavior patterns, personal problems, and home backgrounds.

The precise relationship between a student's socio-economic environment and background and his/her performance in school is both complex and the subject of much dispute. Educators do not yet fully understand this relationship – what specifically causes it and what can be done to change it. Some consider genetics and resultant intellectual inferiority to be an underlying causal factor. Others correlate academic performance with the number of generations a particular family has been in this country. Among the environmental socio-economic factors which have variously been considered to have an important impact upon

schools and the academic achievement level of students are: family income level; family educational level; parental values and expectations, e. g., the importance assigned to education and academic achievement, occupational goals of parents etc.; exposure to and engagement in physical and mental activities that develop school facilitating skills such as motor, oral expression, vocabulary, and language; access to reading materials at home and in the neighborhood, particularly during the years prior to school entry; lack of experiences relevant to schoolwork; a child's rate of mobility, i. e., the number of family moves resulting in school transfers; the nature of a child's background in terms of ease of identification with school programs; the degree of parental involvement with the child and his/her school efforts; and the degree of family stability.

Academic capacities of students are not identical or equal, nor is their motivation to achieve the same. Schools cannot mandate identical achievement levels for all students. The current state of scientific knowledge about the origins or causes of observed racial and social class differences in intelligence quotient and achievement test scores is most unsatisfactory. While the IQ test has served as a reliable predicator of success in school for groups of middle class children of whatever race, it does not measure genetic intellectual ability. When black and white students have the same socio-economic background, there is not a great difference in their average test scores.

During this period, students having relatively low academic achievement levels have been disproportionately concentrated in those Central City schools serving areas having substantial lower socio-economic group populations. Schools in the Central City have generally ranked substantially below those in outlying areas that serve higher socio-economic groups.

There has not been any direct relationship between the student body racial composition of a school and the relative average levels of pupil achievement, intelligence quotients, and school readiness test scores. A rough coincidence of such factors, however, was suggested by the evidence.

For example, with respect to the results of the 1973 kindergarten readiness tests, none of the schools ranking in the top one-quarter were over 16.22%B, and most had very small black pupil population percentages.

None of the schools in the second quarter were over 21.73%B, but there was a wide and varied range of student body racial percentages among the schools so ranked.

The third quarter contained 5 schools whose black pupil percentages were over 85%, including Ninth (100%B), Meinecke (98.54%B), and Auer (96.53%B). Nine schools had no black students, and 7 had black pupil percentages ranging between 11% and 69%.

The fourth quarter contained 21 schools with student populations that were between 70% and 100% black. Four schools had marginal black student populations, while 6 were substantially integrated.

The results of the 1973 intelligence quotient and achievement tests for the 4th and 6th grades at these same elementary schools indicated a comparable series of patterns but with a substantial change in rank among some individual schools.

The results of the 1973 intelligence quotient and achievement tests for 10th graders revealed a slightly different pattern. The top seven rankings were occupied by schools in the 0-10%B category, while schools in the 11-69%B category occupied the next three spots. South, a

school in the 0-10% black category, came next, followed by West which was in the 33-67%B category. The next two places were held by schools in the 90-100%B category, while a school in the 67-90% black category ranked last.

During the period, the Administration has attempted to increase academic achievement through different techniques, approaches, and materials. This effort has also involved an emphasis upon the adaptation of educational programs to the particular needs of a specific school. Lack of motivation has been one of the primary causes of levels of achievement well below students' potential abilities. Educators have been constantly searching for methods and techniques that can be used to instill students with the desire to learn and achieve. The Administration efforts have involved the joint efforts of its psychological and curriculm departments as well as others.

The Administration has strongly emphasized the need for a working relationship between the school and the home. Achievement levels are often affected by a child's home environment between birth and age three. The Administration has endeavored to emphasize the importance of the home environment to mothers, and has tried to instruct them in some of the techniques involved in enabling young children to have the kinds of experiences necessary for subsequent academic achievement.

The system's Head Start Program for pre-kindergarten children serving families with very low incomes is concentrated in the Central City. It provides an educational environment in a school setting and attempts to form the beginning of a working relationship between home and school. The system also has a special kindergarten program.

During the last two decades, overall relative academic achievement levels in the system have consistently declined, although in 1972-73 there was a small rise. This decline has

been attributed to the movement of middle and upper socio-economic classes out of the city.

Some Board and Administration members believe that the system's overall academic achievement levels (including those in the lower socio-economic areas) have finally stopped falling and will now rise substantially. The massive influx of black migrant children into the system has stopped, as has the rapid overall growth in student population. New teaching techniques and programs have been more effective. There has been greater teacher stability in the system and between schools.

I. *The Compensatory Educational Program*

Prior to the mid-1960's, the system provided substantially equal educational services to all schools in the system. Subsequent to the mid-1960's, those schools serving black areas of the city received a greater quantum of such services under the system's compensatory educational program.

The system embarked upon its compensatory educational program in an attempt to increase and equalize the educational opportunities available to low achieving pupils. Because educational needs differed, a disproportionately large quantum of this effort was brought to bear in those Central City schools where the need was the greatest. With the passage of the Elementary and Secondary Education Act of 1965 ("ESEA"), substantial federal funds became available for such programs, and the efforts to meet the needs of underachieving students were expanded and intensified. The compensatory educational prgram, however, has not been limited to those schools eligible for Federal Title I funds, nor have federal funds always been available for all schools and pupils having special educational needs.

A 1966-67 report by the Administration to the Board outlined efforts aimed at meeting the special needs of pupils in the system's schools, thus indicating the nature and parameters of the compensatory educational program: instruction for non-English speaking pupils, orientation centers for immigrant and transient children, head start kindergarten centers, special remedial teachers and basic schools, social adjustment-rehabilitative programs, guidance and counseling services, psychological services and educational research, social work services and personnel, and orientation programs for new teachers.

A disproportionately large percentage of these compensatory educational programs have been in schools with majority black student bodies. For example in 1966-67 there were 1,164 instances of such programs, of which 515 (44.24%) were at schools in the 50-100%B category.

The Administration's policy has been to provide the type of educational programs that make equality of educational opportunities a reality in the sense that each student is not only given a meaningful opportunity for a quality education but is encouraged to take advantage of the opportunity and to achieve to the maximum extent possible within the limits of individual capabilities. This has meant that the programs in schools serving lower socio-economic areas have been tailored to meet particular student needs in an effort to provide them a meaningful equality of educational opportunity. This has also meant that the same amount of money is not being spent for each child within the system because equality of opportunity sometimes calls for greater support of some students and some schools because of their unequal educational needs.

The 1967 report, which explored means of increasing equality of educational opportunities in the system, basically worked within the framework of compensatory education as

a means of alleviating low achievement levels and did not articulate a racial balance goal in this regard.

1. *Special Staffing*

Since 1963, a special staffing formula has been used for schools in areas of high population density and mobility. In such schools the staffing formula was 29 to 32 pupils per teacher as compared to 33 to 36 pupils per teacher in the remainder of the system. In 1962-63, this special formula was applied to 29 elementary schools, 24 of which were located in the black Central City. The result was an average regular class size of 30.6 pupils for these schools as compared to an average of 33.4 throughout the remainder of the system. During 1972-73, these special staffing formulas led to class size averages at the elementary school level of 28.8 versus an average of 32.6 in the rest of the system. At the junior high level, class sizes averaged 28.4 as opposed to an average of 30.2 in the rest of the system. At the high school level, the special staffing formula led to average classes of 25.1 as opposed to 26.8 in the remainder of the system.

2. *Curricular Materials*

The efforts of the Administration during this period included working with teachers to develop and select the various kinds of educational materials appropriate to effective teaching of all students in the system's schools. The goal was to have materials available that would be appropriate to the variety of achievement levels among pupils in the classrooms. Concentration has been upon developing supplementary materials for teachers working with low achieving students.

Since the early 1960's, the Administration has had a policy and practice of encouraging utilization of educational materials (both basic and supplementary) that do not contain culturally biased information or presentations. This has

involved working with publishers to have such materials created as well as development of such materials within the system. Nonetheless, there are presently still problems in this regard to be overcome, though substantial progress has been made.

3. *Social Services*

A part of the system's compensatory educational effort during this period has been its social service program. It is one of several that supplement and complement the educational process in the schools via direct casework type services furnished students, their parents, teachers, and administrators with respect to school related problems such as social behavior, truancy, aggression, and withdrawal. The basic goal of this program has been to help each child make maximum use of educational opportunities available and to help solve problems which interfere with students achieving their respective maximum educational potential.

At present, there are 76 school social workers, 6 supervisors, and 56 school social worker aides. During the period these social work services have been provided to students in the system in accordance with their relative need therefor and have been available to all pupils in the system's schools. A disproportionately large demand for these services has existed among students attending Central City Schools.

4. *Psychological Services*

During the period, the system has also had an extensive psychological service that has gone beyond diagnosis, recommendation, and consultation to therapist type services. This program has included diagnosis of mental retardation conditions as well as other conditions such as learning disabilities. A disproportionate quantum of these services have been furnished to students attending black schools pursuant to a standard of need.

J. *Special Programs*

During this period, the system has provided at least twelve special programs designed to meet the unique educational needs of various students in the system.

The programs aimed at low and problem achievers have emphasized flexible, individualized approaches to education with few pupils per class and parent involvement. Some of these programs are federally funded and limited to schools eligible for Title I assistance.

Programs have been designed to educate handicapped students, including students who are deemed to be mentally retarded or physically disabled and students with learning difficulties. Those services that have been funded by the system have been provided throughout the system according to need, and those which have been federally funded have been provided to students meeting federal criteria. There has been no discrimination against students because of their race, but a disproportionate share of such services have been provided to students attending Central City schools, including those in majority black schools, because of their disproportionate need.

1. *The Reading Services Program*

The Board has provided reading services to all students within the system upon the basis of need. During this period, special reading center classes were conducted wherever the need existed and educationally practicable space was available. Space problems are not so great now as they were in the past due to declining school enrollments.

The system has operated two special language skill centers located in the black Central City and the white Central City. They emphasize instruction in reading and other language art skills. Access thereto is restricted to

children residing in the low income areas of the Central City. The goal is to assist students whose reading skills are retarded relative to their predicted abilities. The program stresses small classes and attempts to work closely with parents to the end that the students will overcome their reading deficiencies and return to their home schools at a reading level commensurate with their respective abilities.

Plaintiffs have proven that from 1960-61 through 1967-68, the ratio of enrollment in those schools with reading centers to the number of reading center teachers at that school was generally lower in the schools with student bodies 0-10% nonwhite than in those schools where the percentage was 90-100%. Similarly, plaintiffs proved that the ratio of enrollment to the number of reading center teachers was lower in those schools where the nonwhite percentage was 0-33% than in those schools where it was 67-100%. The evidence, however, does not establish how many students at any given school needed reading center services or what the ratio was in any of these schools between the reading center teacher and the students who actually utilized or required such services.

2. *The Special Class Program*

During the period, the parents of educationally retarded children with acute leaning difficulties (i. e., intelligence quotient test scores are about 70% of normal) could choose to have their children attend special classes ("Special C").

Centers for educable retarded children are located throughout the city but not in each school. These classes are dispersed throughout the system because it is deemed to be educationally desirable to keep such students in contact with other regular students. Further, a child is not necessarily in the special class all the time but may be assigned to regular classes with respect to certain matters. Resources, space, and

convenience to the children served are among the factors considered in locating such centers, and they can shift from year to year. The children are transported to the classes at public expense.

During 1959-60 through 1967-68, there were disproportionately more students in Special C classes located in schools whose regular student body was predominantly black than in schools whose regular student body was predominantly white, and this disproportionality increased during those years. The evidence, however, does not establish where students in Special C classes resided or what their racial mix was. However, in general, such special classes have had a disproportionate number of black students.

The evidence does not establish that any nonwhite students who should have been recommended for such classes were not so recommended or that any nonwhite students who should not have been recommended for such classes were so recommended.

3. *The Superior Ability Program*

The superior ability students program was developed during the late 1950's and constituted the academic portion of an overall scheme of providing programs for gifted children in various areas.

Students have been selected for this program primarily on the basis of group intelligence and achievement test scores, with those ranking above a given percentile automatically selected. Students who have lower overall scores but high scores in one area or another are individually considered and evaluated by a psychologist and classroom teachers. Generally about 5% of the system's students qualify, but actual enrollment has been smaller because some parents decline to enroll their children in the program. At the

elementary level, students participate in the program on a full-time basis in grades 5 and 6. At the secondary level, however, the program is structured by subject so that a student may be in a superior ability class with regard to one subject but not others.

The evidence does not establish that any black student satisfying these criteria was ever denied admission to the program, any white student not satisfying these criteria was ever admitted, or that black and white students assigned to superior ability classes were treated differently or had unequal educational opportunities within the program.

In 1967-68, there were 197 students in the four elementary schools with superior ability classes, 11 of whom (6.28%) were black. At the same time, black students comprises 27.7% of all elementary students. There were 1,492 students in the 14 secondary schools attending superior ability classes, 16 of whom (1.07%) were black. At the same time blacks accounted for 18.47% of all students in the system's secondary schools. The evidence does not establish that these statistics were the result of anything other than uniformly applied selection criteria and/or voluntary election by parents or children not to participate in superior ability classes.

The evidence does not establish in detail what the situation has been during 1968-69 to the present, but in general the number of black students who have qualified for and have been chosen to participate in the program has been disproportionately low.

During this period, the basic policy and practice has been to place superior ability classes in schools located near concentrations of pupils in the program. Classes are not located in each of the system's schools because there are not sufficient numbers of such students residing in each district

to justify this. Locations have shifted from time to time as the number of students residing within a particular school district and/or the space available in schools has varied. Generally, an elementary school superior ability center draws students from about 6 to 10 elementary school districts. Secondary level programs generally serve about 2 to 3 districts. If the number of students justifies it, in some instances more than one superior ability class may be established at a particular center. It is deemed to be educationally desirable, when practical, to have teachers of superior ability classes work together and to have interchange among the students in superior ability classes. In 1967-68, there were superior ability classes in 18 schools (4 elementary, 7 junior high, 7 senior high), 16 with student bodies 0-10% nonwhite, and 2 with student bodies 10-33% nonwhite. Pupils are transported to superior ability classes at parental expense, except that they can utilize existing system bus transportation if any goes to or by their school provided they do not displace other pupils riding the bus.

4. *Trade and Technical Program*

Milwaukee Trade & Technical High School (formerly known as Boys' Tech and herein referred to as "Tech") is a vocationally oriented high school serving the entire system. The basic curriculum is essentially the same as that of other high schools in the system except that additional mathematics and laboratory science courses are required. During the period, Tech had very few nonwhite students.

In the past few years, intensified school recruitment efforts have resulted in the number of black enrollees increasing substantially. During 1972-73, 13% of Tech's enrollment was black. The intensified effort to recruit minority students for Tech was prompted by Board action.

Among the reasons given to explain low black enrollment at Tech during the period was the public's

understanding that education there prepared one for entry into a trade. Until the last four or five years, there were very few blacks employed in the city in a trade capacity. Consequently, black students generally had little encouragement from their parents and other relatives to become tradesmen and, hence, little motivation to attend Tech.

The name of the school changed from Boys' Tech to Milwaukee Trade & Technical High School in September 1972, and girls were admitted thereafter. This has been an important factor in raising minority student enrollment. In 1973-74, 116 girls were enrolled. Of the 102 black students enrolled in that year, about 50 were girls.

K. *Financial Expenditures*

During 1972-73, total estimated expenditures for school operations in the system were about $144.3 million. Of the total expenditures that year, 63% came from city property taxes, 4% from construction bonds, 8% from federal aid, 21% from state aid, and 4% from other sources. Looking to the objects of expenditure, 61% went for instruction, 2% for buildings and equipment, 12% for plant operation and maintenance, and 25% for other expenses.

1. *Operating Expenditures*

The overall operating cost per regular school pupil in 1971-72 was $953.99. During 1972, per pupil expenditures (including operations, equipment, and maintenance) at the various schools were not directly related to student body racial percentages.

The three senior high schools with the highest per pupil expenditures and their black pupil percentage were West (64%B), Riverside (47%B), and Washington (39%B). The

lowest was Bay View (0%B). Per pupil expenditures at King (99%B) and North (100%B) were higher than those of any of the schools in the 0-33%B racial category.

The three junior high schools with the highest per pupil expenditures were Fulton (99%B), Peckham (97%B), and Wells (80%B). The two lowest were Webster (6%B) and Parkman (99%B).

The regular elementary schools with the highest per pupil expenditures were Wilson Park (0%B), Cass 35%B), Berger (98%B), Fourth Street (99%B), Garfield (96%B), Hawley (2%B), Lee (99%B), MacArthur (0%B), McKinley (98%B), and Vieau (1%B). Of the 11 highest per pupil expenditure schools, 5 were in the 95-100% nonwhite category, 1 was 35%, and 5 were in the 0-5% category.

Comparable patterns and nonpatterns existed in 1968 and 1969.

2. *Construction Expenditures*

As to all schools and additions constructed up to 1967-68, the aggregate original cost per pupil when measured by the 1967-68 per school pupil population and racial make-up disclosed that those schools then having white pupil majorities had a higher original cost than the schools having black majorities.

The expenditure per building for buildings constructed after 1950 was higher for the majority black than for the majority white schools, and more was spent on the average in modernizing majority black schools than predominantly white schools.

The evidence does not establish what the student body enrollment or racial percentages were at these schools when

the initial buildings were constructed.

The average age of majority black schools was much older than the majority white schools, and hence the figures relating to these schools would be greatly affected by the inflation of building costs over the years.

The evidence does not establish that the amount of money spent for building construction during the same relative time period for like building projects were unreasonably different for schools which had majority black student bodies as compared to majority white. For example, among projects contained in the 1973 revised capital improvement program, both the South (1%B), and North (100%B) replacement high schools were estimated to cost $15.4 million. Similarly, the Twenty-First Street elementary replacement school (99%B) was estimated to cost $2,025,000, while two new elementary schools in the Granville area (predominantly nonwhite residential area) were estimated to cost $2,175,000.

The following table sets forth the cost per classroom of modernization and new construction at various schools:

Modernization		New Construction	
School	Cost	School	Cost
Elm (82%B)	$29,887	Alcott (0%B)	$31,983
Hayes (0%B)	22,202	MacDowell (76%B)	28,277
Lloyd (100%B)	21,790	Holmes (88%B)	26,133
Forest Home (3%B)	19,938	Hawthorne (6%B)	24,888
Berger (98%B)	18.551	Cooper (0%B)	21,683

There is no direct relationship between a school's student body racial percentages (presently or during the bid year) and the total cost, the cost per square or cubic foot, or the cost per classroom with respect to additions and/or modernizations.

L. *Board Attitudes and Intent*

During the period, the Board's fundamental purpose was the maintenance and preservation of the neighborhood school policy. The Board knew that adherence to the neighborhood school policy would result in a high proportion of racially imbalanced schools but believed, in good faith, that such a policy would produce the best possible educational opportunities for all students in the system, regardless of race.

From the mid-1950's through the present, Board members have been generally aware of the areas in the city in which the majority of blacks have resided, as well as the high predominance of black students attending schools serving those areas. They have similarly been aware of the high predominance of white students attending schools serving areas having heavy white residential concentrations. The Board has been concerned about such matters and has often discussed and considered racial changes in the system's schools.

During 1963-64, the Board's Special Committee on Equality of Educational Opportunity conducted an extensive investigation into the problems of the Central City schools. Major proposals considered included formulation of an explicit policy of integrating all schools; inclusion of racial integration as a major criterion in the location of new schools, the drawing of district boundaries and the assignment of teachers; eradication of the intact bussing procedure; and the creation and implementation of a comprehensive plan for integrating all the system's schools. The committee turned down these "integration" proposals, recommending instead that the system concentrate on utilizing massive "compensatory education" in these schools.

The committee concluded that:

(a) "Segregation" in a school system exists only when there is deliverate compulsory separation of white and nonwhite students into separate schools solely on account of their race.

(b) Where a school system has been organized along neighborhood school lines, and where those schools serve all pupils residing in their respective districts without regard to race, color, religion, or national origin, there is no obligation to take affirmative steps to alleviate resulting de facto segregation and/or racial imbalance.

There have not been any affirmative actions taken by the Board that have resulted in further integration or substantial lessening of the percentage of black students in any of the system's schools, nor has the Administration made any such recommendations despite discussions and evaluations by both the Administration and the Board.

The majority of school board members have historically taken the position that the Board is under no obligation to take affirmative steps to effect further integration or racial balance or to lessen the percentage of black pupils in any or all schools within the system. The Board has consistently refused to take any acts that would lessen the degree of racial segregation resulting from residential patterns and the neighborhood school policy as modified by the Free and Open Transfer programs.

Given existing residential racial patterns and the location of the schools having substantial racial imbalance, the Board concluded that the achievement of racial integration would require the abandonment of the neighborhood school policy and what they perceived to be the benefits flowing therefrom. This they were not willing to do.

The following means of attempting to achieve greater racial balance and further integration within the system were deemed to be inconsistent with the neighborhood school policy and accordingly were never used: pairing of schools, bussing of pupils, utilization of magnet schools, modification of open transfer system, and noncontiguous or pie-shaped districts.

Considerations and reasons that the Board and Administration advanced in support of their failure to take any steps in furtherance of lessening the degree of racial imbalance in the system included the following:

(a) The cost and added expense that any proposed policy of furthering racial integration or racial balance would entail.

(b) Parental opposition to the bussing of their children to schools with large numbers of children from lower socio-economic backgrounds with the concomitant specter of the movement of massive numbers of middle and upper socio-economic community members out of the city and/or the enrollment of large numbers of children in private schools. Board members are particularly concerned that the overall percentage of black students in the system is presently at the "tipping point" of 30-35%. In their opinion, efforts at obtaining greater racial balance would probably "tip" the entire city and school system within a very few years. On the basis of this predicted tipping, Board members maintain that the short term effect of efforts aimed at achieving racial balance would be outweighed in the long run by the segregative effect of white flight.

(c) The deleterious effects upon students' overall educational and social well being resulting from the loss of benefits considered to flow from a neighborhood school

setup, particularly the inability to obtain active and enthusiastic involvement in school activities by parents, pupils, teachers, and administrators.

(d) The time and emotional burdens imposed upon students bussed to schools outside the districts in which they reside.

(e) The Board's belief that racial integration would not substantially improve educational opportunities, the equality of educational programs, or the academic achievement levels of black and/or low achieving students.

The Board and Administration believe that (a) generally, pupils of low socio-economic backgrounds and environments have relatively low achievement levels; (b) socio-economic considerations are an imperative variable with respect to pupil and school achievement levels, and that there is a causal relationship between those two factors rather than between achievement and race *per se*; and (c) the existence of a good student body racial mix, alone, will not raise the achievement levels of low achieving students.

The Board, however, conceded that the attainment of racial integration would not necessarily educationally harm all students. If the result were a socio-economic cross-section of students with corresponding achievement levels in each school, low achieving students might benefit from their association with pupils from middle and upper socio-economic backgrounds. Academic performance would be enhanced, within the limits of individual capabilities, to the extent that low achieving students adopted the goals, perceptions, and motivations of their high achieving classmates. But the Board believed it to be equally true that this might not occur for a variety of reasons.

If the academic competition proved insurmountable to the low achieving students, educationally harmful attitudes

might result such as defeatism, resignation, uncomfortableness, lower self-concepts, and feelings of hostility against the educational environment.

Conversely, the Board was concerned that the educational opportunities of high achieving students might be prejudiced. The presence of large numbers of slow achieving students in schools that previously had high achievement levels would necessitate a complete modification of academic programs so as to be able to meet the different educational needs of these students. Previously high achieving pupils might find their motivations decreased substantially because of the change in curriculum and the shift in the composite academic abilities of their peers.

Among the system's educational problems during the period that the Board and Administration deemed to be of higher priority than racial balance were declining achievement levels in the system and relatively low overall achievement levels in those schools serving the lower socio-economic areas of the city. During this period the Board and Administration determined that the best way of attempting to meet the educational needs and problems of the lower socio-economic students, including the students in most of the schools having high black student body percentages, would be via the system's compensatory educational program.

The Board and Administration believed that efforts to resolve the problem of racial isolation in the system's schools were subordinate to the primary objective of providing quality education to the system's students. In their opinion, quality education was advanced by adherence to the neighborhood school policy. In addition, they concluded that affirmative efforts to racially integrate the system's schools would be in derogation of their self-chosen educational objectives. Given these policy guidelines, the results of the Board's actions with respect to racial imbalance were foreordained.

The actions and positions taken by the Board and the Administration during this period were engaged in with the full knowledge that racial segregation existed in the system's schools and would continue to exist unless certain policies were changed, particularly that of neighborhood schools.

At the same time, even Board members inclined toward affirmative action to attain racial goals agree that the majority Board members' views and decisions to the contrary were not motivated by any desire to discriminate against or otherwise "shortchange" black students. To the contrary, the majority members had as their objective quality education for all. From their point of view, quality education required adherence to the neighborhood school policy even though that policy necessitated the creation of segregated schools.

M. *Racial Imbalance*

During the first half of the 1950's, there were relatively few nonwhite students in the system. Only 2 high schools, 1 junior high school, and 10 elementary schools had pupil populations that were at least 10% nonwhite. By 1954-55, the increase in the number of nonwhite pupils was such that 4 elementary schools were almost all nonwhite and 3 other elementary schools were about one-third nonwhite. The junior high school previously referred to had become two-thirds nonwhite, while the 2 high schools had become one-third nonwhite.

From 1955-56 through 1962-63, the same pattern essentially continued. By 1959-60, 1 high school had become over 90% nonwhite, another had become over 50% nonwhite, while 2 others had become at least 10% nonwhite. One junior high school had become over 90% nonwhite, and another had become at least 10% nonwhite. Nine elementary schools were over 90% nonwhite, 2 were over 67% nonwhite, and another 2 were over 50% nonwhite. During this period, the overall

number of schools having student bodies between 11% and 70% nonwhite steadily increased.

During 1963-64, the system schools had the following nonwhite percentages:

	1963-64				
	0-10%	10-33%	33-67%	67-90%	90-100%
Elementary Schools	86	11	2	4	13
Junior High Schools	11	–	1	–	2
Senior High Schools	6	3	–	1	2

In 1972-73, the system schools' black pupil populations had increased as follows:

	1972-73				
	0-10%	10-33%	33-67%	67-90%	90-100%
Elementary Schools	71	17	5	5	23
Junior High Schools	10	3	–	2	4
Senior High Schools	8	1	3	1	2

There were also 6 separate special schools in the system which had the following black student percentages: 69%, 27%, 89%, 13%, 38%, and 0%.

The following table arrays various statistics for the 4 high schools, the 6 junior high schools, the 28 elementary schools, and the 3 special schools that are presently 67-100% black.

School	Yr. became 67% Black	% Black Students	1973-74 No. of Principals and % Black	1973-74 Principals & % Black	1973-74 No. of full time teachers & % Blk	1967-68 % Black Teachers	1963-64 % Black Teachers
HS		1973					
King	1967	99.55	1 (100%)	3 (66.67%)	98 (42.86%)	13.10	4.28
Lincoln	1962	82.23	1 (100%)	3 (33.33%)	73 (38.36%)	26.92	18.33
North	1957	100.00	1 (100%)	4. (75%)	85 (42.35%)	34.57	31.67
West	1973	68.57	1 (0%)	2. (50%)	76 (17.11%)	6.94	7.35
JHS							
Fulton	1960 (sem.II)	98.62	1 (100%)	3 (33%)	80 (60%)	56.41	45.45
Parkman	1968	99.29	1 (100%)	3 (33%)	83 (65.06%)	---	---
Peckham	1971*	97.92	1 (0%)	2 (50%)	44 (38.64%)	5.77	0
Robinson (Peckham Annex)	1972	85.92	1 (0%)	2 (50%)	27 (33.33%)	---	---
Roosevelt	1953	99.47	1 (0%)	2. (100%)	51 (62.75%)	51.85	48.93
Wells	1971	84.62	1 (100%)	2 (50%)	55 (50.91%)	32.20	19.30
ES							
Auer	1967	98.42	1 (0%)	3 (66.67%)	53 (30.19%)	22.73	12.50
Berger	1964	98.04	1 (100%)	2. (0%)	31 (45.16%)	42.42	19.05
Brown	1961	96.17	1 (0%)	1 (100%)	29 (37.93%)	51.43	40.00
Clarke	1971*	89.79	1 (0%)	2 (100%)	45 (22.22%)	16.67	11.11
Elm	1971*	82.27	1 (0%)	1 (0%)	22 (31.82%)	17.86	7.69
Fifth	1955	97.83	1 (0%)	1 (0%)	24 (37.50%)	28.57	34.62
Fourth	1950	100.00	1 (0%)	0 (0%)	9 (33.33%)	64.29	64.71
Franklin	1966	98.85	2 (0%)	4 (0%)	48 (25%)	26.92	8.33
Garden Homes	1969	96.63	1 (0%)	1 (100%)	25 (36%)	14.29	0
Garfield	1950	94.71	1 (0%)	1 (100%)	18 (61.11%)	51.85	47.83
Green Bay	1966	98.34	1 (0%)	1 (100%)	30 (63.33%)	23.08	6.67
Holmes	1966	87.97	1 (0%)	1 (100%)	38 (55.26%)	70.00	---
Hopkins	1957	98.34	1 (0%)	1 (0%)	37 (45.95%)	53.66	69.23
Keefe	1960	99.52	1 (0%)	1 (100%)	42 (30.95%)	44.44	40.54
LaFollette	1959	99.28	1 (100%)	1 (0%)	31 (41.94%)	38.89	42.42
Lee	1951	98.96	1 (0%)	1 (0%)	17 (52.94%)	57.69	61.54
Lloyd	1953	99.81	1 (100%)	1 (0%)	28 (46.43%)	31.03	38.39
MacDowell	1971*	75.82	1 (0%)	1 (0%)	33.4 (29.94%)	12.12	---
McKinley	1962	98.28	1 (0%)	1 (100%)	35 (40%)	39.39	34.29
Meinecke	1966	100.00	1 (0%)	0 (0%)	10 (30%)	54.55	---
Ninth	1950	100.00	1 (100%)	1 (0%)	24 (58.33%)	50.00	73.08
Palmer	1960	90.96	1 (0%)	1 (100%)	24 (58.33%)	46.34	46.34
Phillipp	1966	99.55	1 (100%)	0 (0%)	18 (27.78%)	16.75	9.09
Siefert	1957	96.80	1 (0%)	1 (0%)	30 (30%)	39.39	35.90
Twelfth	1957	100.00	1 (100%)	1 (0%)	18 (50%)	53.57	55.56
Twentieth	1958	98.70	1 (0%)	1 (100%)	30 (43.33%)	52.78	48.48
Twenty-First	1962	99.32	1 (0%)	1 (100%)	35.2 (59.66%)	51.43	26.67
Walnut	1965	90.20	1 (0%)	1 (100%)	11 (36.36%)	57.14	15.38
Field	1972	68.24	1 (0%)	0 (0%)	17 (41.18%)	0	0
Jefferson	1968	87.97	1 (100%)	0 (0%)	19 (31.58%)	---	14.29
Lady Pitts Center	1973	97.30	1 (100%)	0 (0%)	7 (42.86%)	---	---

* No data for the 1970-71 school year

(Pl. Exs. 1-23, 25-27, 278-79. 563, 579-80, 582-83)

N. *Causes of Racial Imbalance*

The causes of the gross racial imbalance in the system's schools have been completely different from the causes of such imbalance in the South prior to 1954, where blacks and whites residing together in the same geographical area were forced by law to be educated in completely separate school systems.

The gross imbalance in the city's racial residential patterns, superimposed upon the neighborhood school policy, has produced a number of schools which are predominantly white or predominantly black. During the period, schools with large percentages of black students have been located in and serving areas with high percentages of black residential concentration.

Substantial numbers of blacks and whites have seldom resided in the same neighborhood or attended the same schools for a substantial period of time. Once a substantial percentage (generally about 30%) of blacks reside in a neighborhood and/or attend the neighborhood school, there is generally a great acceleration in the rate of change, and thereafter the neighborhood and/or school is generally destined to have a very high predominance of black residents within a relatively short period of time. This phenomenon is referred to as the "tipping point." The rate of change varies among schools and neighborhoods, but it is seldom reversed, as the whites continue to move out at an ever increasing rate and the percentage of black residents correspondingly rises until only residual whites (e. g., elderly and members of lower socio-economic classes) remain. An example of an exception occurs when a new kind of housing is built in a neighborhod (e. g., high cost housing in downtown areas).

The relationship over a substantial period of time between racially changing residential areas and racially

changing schools located therein is complex, obtuse, and causally interrelated. There is generally a lower percentage of blacks in the residential neighborhood than in the school located therein. This has been caused by various factors, including the fact that remaining white residents have tended to be substantially older with fewer children of school age than the black residents who are generally younger with a higher fertility rate; the fact that white children have attended private and parochial schools to a greater degree than blacks; and the fact that the net transfers in and out of the school (before families move their residences) have generally resulted in a net addition of black students and a net subtraction of white students. When this divergence between school and neighborhood occurs, it is generally temporary over a relatively short period of time, occurrring before the neighborhoods and/or schools become predominantly black. Thereafter, neighborhood and school percentages will be comparable.

The interaction of the neighborhood school policy and black residential patterns, however, has not been the only cause of serious racial imbalance in the system's schools. The Open Transfer program in particular played a significant part in producing racial imbalances at the secondary school level. The 1972 study of open transfers revealed that the program substantially contributed to the increase in black student concentration in at least six secondary schools (King, Lincoln, Peckham, Fulton, Wells, and West). While the effect of transfers on racial imbalance was often surpassed at a later date by the impact of changing residential patterns, the fact remains that the transfer system facilitated the flight of white students from black schools at a point in time preceding a comparable departure of white residents from black neighborhoods.

Moreover, racial imbalances were exacerbated by the steps the Board took to relieve the overcrowding which

occurred in certain neighborhood school districts as white populations were replaced by black populations containing relatively more school-aged children. In particular, racial imbalance was advanced by the Board's practices in siting new schools, building additions for existing schools, leasing or purchasing unused buildings for school purposes, utilizing substandard classrooms, changing district boundaries, and bussing primarily black students intact to primarily white schools where the bussed students were kept separate from students in the receiving school.

The selection of sites for the Center and Pierce replacement schools indicates how school siting can produce racial imbalance. As a result of its location, Pierce remained a white school for many years, whereas the location of Holmes meant it opened as an 85% black school.

The building of large additions to ghetto schools perpetuated the pattern of racial imbalance in these schools. The additional space so created facilitated the "containment" of black pupil population growth within pre-existing school district lines.

The disproportionate use of substandard classrooms in the black schools resulted in concentrating black students at times when the use of facilities at nearby white schools would have resulted in an appreciable degree of race mixture at these white schools.

The general effect of the boundary changes in black schools in 1967-68 was to increase the degree of racial imbalance in these schools. Of the 63 boundary changes, 29 increased the concentration of black students in ghetto schools. In one case it resulted in a number of black students attending a white school for the first time. Twenty-eight changes had no effect because there were no differences in the racial makeup of the losing school or the gaining school.

In five cases the results were inconclusive as they affected schools that differed in their racial makeup, although in all five cases majority black schools were involved.

During the period 1960-61 through 1972, large numbers of black children were bussed on an intact basis to white schools as well as black schools. Using intact bussing resulted in the bussed children remaining in black schools. The use of other means of relieving overcrowding would have reduced the concentration in the black schools.

III. CONCLUSIONS OF LAW

At issue in this case is whether the undisputed racial isolation and imbalance which exists in the Milwaukee public schools is the product of unlawful and unconstitutional segregation.

We are not presented with a situation wherein racial segregation was ever mandated or otherwise required by statutory or other formal law. See, e. g., *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). In the absence of statutes or other legislative enactments requiring racial separation, racial isolation or imbalance constitutes unlawful and unconstitutional segregation only if it was brought about or maintained by intentional state action.

The law is not blind as to only proscribed school segregation which is the result of legislative enactments bearing on their face the mark of governmental action violative of the Equal Protection Clause of the Fourteenth Amendment. The law equally forbids more subtle means of achieving the proscribed end of governmental segregation on the basis of race. The facially neutral actions of state authorities constitute illegal and unconstitutional *de jure* segregation if they are intended to and have the effect of racial separation.

In determining whether the racial imbalance and isolation that presently exists in the Milwaukee school system is the product of unlawful *de jure* segregation, this Court is guided by the decision of the United States Supreme Court in *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973). I will quote at length from the Court's opinion in that case as it sets forth the law to be followed and applied in cases where school segregation is the result of facially neutral school policies:

> "The respondent School Board invoked at trial its 'neighborhood school policy' as explaining racial and ethnic concentrations within the core city schools, arguing that since the core city area population had long been Negro and Hispano, the concentrations were necessarily the result of residential patterns and not of purposefully segregative policies. We have no occassion to consider in this case whether a 'neighborhood school policy' of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have committed acts constituting *de jure* segregation. It is enought that we hold that the mere assertion of such a policy is not dispositive where, as in this case, the school authorities have been found to have practiced *de jure* segregation in a meaningful portion of the school system by techniques that indicate that the 'neighborhood school' concept has not been maintained free of manipulation. * * *" 413 U.S. at 211-212, 93 S.Ct. at 2699.

> "* * * we hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. * * * We emphasize

that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* is purpose or intent to segregate. Where school authorities have been found to have practiced purposeful segregation in part of a school system, they may be expected to oppose system-wide desegregation, as did the respondents in this case, on the ground that their purposefully segregative actions were isolated and individual events, thus leaving plaintiffs with the burden of proving otherwise. But at that point where an intentionally segregative policy is practiced in a meaningful or significant segment of a school system, as in this case, the school authorities cannot be heard to argue that plaintiffs have proved only 'isolated and individual' unlawfully segregative actions. In that circumstance, it is both fair and reasonable to require that the school authorities bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by segregative intent." 413 U.S. at 208-209, 93 S.Ct. at 2697.

"* * * the Board's burden is to show that its policies and practices with respect to schoolsite location, school size, school renovations and additions, student-attendance zones, student assignment and transfer options, mobile classroom units, transportation of students, assignment of faculty and staff, etc., considered together and premised on the Board's so-called 'neighborhood school' concept, either were not taken in effectuation of a policy to create or maintain segregation in the core city schools, or, if unsuccessful in that effort, were not factors in causing the existing condition of segregation in these schools. * * *." 413 U.S. at 213, 93 S.Ct. at 2700.

"* * * What is or is not a segregated school will necessarily depend on the facts of each particular case. In addition to the racial and ethnic composition of a school's student body, other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school, must be taken into consideration. * * *" 413 U.S. at 196, 93 S.Ct. at 2691.

"Petitioners apparently concede for the purposes of this case that in the case of a school system like Denver's, where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action. * * * [T]he District Court found that '[b]etween 1960 and 1969 the Board's policies with respect to those northeast Denver schools show an undeviating purpose to isolate Negro students' in segregated schools 'while preserving the Anglo character of [other] schools.' 303 F.Supp. at 294. This finding did not relate to an insubstantial or trivial fragment of the school system. On the contrary, respondent School Board was found guilty of following a deliberate segregation policy at schools attended, in 1969, by 37.69% of Denver's total Negro school population, including one-fourth of the Negro elementary pupils, over two-thirds of the Negro junior high pupils, and over two-fifths of the Negro high school pupils. In addition, there was uncontroverted evidence that teachers and staff had for years been assigned on the basis of a minority teacher to a minority school throughout the school system. * * * We have never suggested that plaintiffs in school desegregation cases must

bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system. Rather, we have held that where plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (*Brown I*), the State automatically assumes an affirmative duty 'to effecuate a transition to a racially nondiscriminatory school system,' *Brown v. Board of Education*, 349 U.S. 294, 301, 75 S.Ct. 753, 756, 99 L.Ed. 1083 (1955) (*Brown II*), see also *Green v. County School Board*, 391 U.S. 430, 437-438, 88 S.Ct. 1689, 1693-1694, 20 L.Ed.2d 716 (1968), that is, to eliminate from the public schools within their school system 'all vestiges of state-imposed segregation.' *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S.Ct. 1267, 1275, 28 L.Ed.2d 554 (1971).

"This is not a case, however, where a statutory dual system has ever existed. Nevertheless, where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system. Several considerations support this conclusion. First, it is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or designating 'feeder' schools on the basis of race has the reciprocal effect of keeping other nearby schools predominantly white. Similarly, the

practice of building a school * * * to a certain size and in a certain location, 'with conscious knowledge that it would be a segregated school,' * * * has a substantial reciprocal effect on the racial composition of other nearby schools. So also, the use of mobile classrooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools. We recognized this in *Swann* when we said:

" 'They [school authorities] must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.

" 'In the past, choices in this respect have been used as a potent weapon for creating or

maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.' 402 U.S., at 20-21, 91 S.Ct. [1267] at 1278.

"In short, common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions. This is not to say, of course, that there can never be a case in which the geographical structure of, or the natural boundaries within, a school district may have the effect of dividing the district into separate, identifiable and unrelated units. Such a determination is essentially a question of fact to be resolved by the trial court in the first instance, but such cases must be rare. In the absence of such a determination, proof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the

existence of a dual system. Of course, where that finding is made, as in cases involving statutory dual systems, the school authorities have an affirmative duty 'to effecuate a transition to a racially nondiscriminatory school system.' *Brown II*, supra, 394 U.S. at 301, 75 S.Ct. [753] at 756." 413 U.S. at 198-203, 93 S.Ct. at 2692-2695.

"The District Court * * * began its examination of the core city schools by requiring that petitioners prove all of the essential elements of *de jure* segregation – that is, stated simply, a current condition of segregation resulting from intentional state action directed specifically to the core city schools. The segregated character of the core city schools could not be and is not denied. Petitioners' proof showed that at the time of trial 22 of the schools in the core city area were less than 30% in Anglo enrollment and 11 of the schools were less than 10% Anglo. Petitioners also introduced substantial evidence demonstrating the existence of a disproportionate racial and ethnic composition of faculty and staff at these schools.

"On the question of segregative intent, petitioners presented evidence tending to show that the Board, through its actions over a period of years, intentionally created and maintained the segregated character of the core city schools. Respondents countered this evidence by arguing that the segregation in these schools is the result of a racially neutral 'neighborhood school policy' and that the acts of which petitioners complain are explicable within the bounds of that policy. * * *" 413 U.S. at 205-207, 93 S.Ct. at 2696-2697.

I will also quote from the recent decision of the United States Court of Appeals for the Eighth Circuit in *United States v. School District of Omaha*, 521 F.2d 530 (8th Cir. 1975). The facts in the *Omaha* case are strikingly similar to the facts here involved, so much so that the defendants placed principal reliance on the district court's decision in their post-trial brief. Upon review, the district court was promptly reversed:

> "Although *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), dealt only with a school system in which segregation was mandated by law; it has since been made clear in a series of 'northern and western' cases[7] that no

"7. *See, e. g., Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974) (Detroit); *Keyes v. School District No. 1*, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973) (Denver); *Hart v. Community School Bd. of Ed., N. Y. Sch. Dist. No. 21*, 512 F.2d 37 (2nd Cir. 1975) (New York City); *Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449 (1975) (Boston); *Oliver v. Michigan State Board of Education*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449 (1975) (Kalamazoo); *Berry v. School Dist. of City of Benton Harbor, Mich.*, 505 F.2d 238 (6th Cir. 1974); *Brinkman v. Gilligan*, 503 F.2d 684 (6th Cir. 1974) (Dayton); *Johnson v. San Francisco Unified School District*, 500 F.2d 349 (9th Cir. 1974); *Soria v. Oxnard School District Board of Trustees*, 488 F.2d 579 (9th Cir. 1973), *cert. denied*, 416 U.S. 951-952, 94 S.Ct. 1961, 40 L.Ed.2d 301 (1974); *United States v. Board of Sch. Com'rs of Indianapolis, Ind.*, 474 F.2d 81 (7th Cir.), *cert. denied*, 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041 (1973); *Kelly v. Guinn*, 456 F.2d 100 (9th Cir. 1972), *cert. denied*, 413 U.S. 919, 93 S.Ct. 3048, 37 L.Ed.2d 1041 (1973) (Las Vegas); *Davis v. School District of City of Pontiac, Inc.*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913, 92 S.Ct. 233, 30 L.Ed.2d 186 (1971); *United States v. School District 152 of Cook County, Ill.*, 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943, 91 S.Ct. 1610, 29 L.Ed.2d 111 (1971); *Taylor v. Board of Ed. of City Sch. Dist. of New Rochelle*, 294 F.2d 36 (2nd Cir.), *cert. denied*, 368 U.S. 940, 82 S.Ct. 382, 7 L.Ed.2d 339 (1961); *Clemons v. Board of Education of*

(footnote cont.)

> intentionally segregated school system can be tolerated under the Constitution. It is equally clear that the 'intent' which triggers a finding of unconstitutionality is not an intent to harm black students, but simply an intent to bring about or maintain segregated schools. Thus, even if a school board believes that 'separate but equal' is superior for black children, that belief will not save the intentional segregation from a finding of unconstitutionality. 'Benevolence of motives does not excuse segregative acts.' *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 182-183 (6th Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449 (1975). *See also Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961); *Hart v. Community School Bd. of Ed., N. Y. Sch. Dist. No. 21*, 512 F.2d 37, 50 (2nd Cir. 1975).

> "Since segregation in the Omaha public schools was obvious at the time of trial, the only question presented to the District Court was whether or not the defendants intended to bring about or maintain that condition. The District Court properly recognized that segregative intent usually must be inferred. It held, however, that the burden of proving such intent rested at all times on the appellants, and concluded that the appellants had failed to meet that burden, despite its findings

Hillsboro, 228 F.2d 853 (6th Cir.), *cert. denied*, 350 U.S. 1006, 76 S.Ct. 651, 100 L.Ed. 868 (1956); *Husbands v. Pennsylvania*, 395 F.Supp. 1107 (E.D.Pa. 1975); *Booker v. Special School Dist. No. 1, Minneapolis, Minn.*, 351 F.Supp. 799 (D.Minn.1972); *Spangler v. Pasadena City Board of Education*, 311 F.Supp. 501 (C.D.Calif.1970).

that various acts and omission of the defendants had the natural, probable, foreseeable and actual consequence of creating and maintaining segregation.[8]

"We hold that a presumption of segregative intent arises once it is established that school authorities have engaged in acts or omissions, the natural, probable and foreseeable consequence of which is to bring about or maintain segregation. [Footnote omitted.] When that presumption arises, the burden shifts to the defendants to establish that 'segregative intent was not among the factors that motivated their actions.' *Keyes v. School District No. 1*, 413 U.S. 189, 210, 93 S.Ct. 2686, 2698, 37 L.Ed.2d 548 (1973).

"Two other Circuits have recognized a presumption based on the natural, probable and foreseeable consequences test. *Hart v. Community School Bd. of Ed., N. Y. Sch. No. 21, supra* 512 F.2d at 50-51; *Oliver v. Michigan State Board of Education, supra* 508 F.2d at 182. The Second Circuit reasoned:

> " '* * * [W]e believe that a finding of *de jure* segregation may be based on actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequence of causing educational segregation. * * *

"8. The District Court found in several instances that the segregative results were not only foreseeable, but that the defendants had conscious knowledge of the likelihood of such results, particularly with respect to faculty assignment, school construction, and the deterioration of Tech High.

> " 'To say that the foreseeable must be shown to have been actually foreseen would invite a standard almost impossible of proof save by admissions. When we consider the motivation of people constituting a school board, the task would be even harder, for we are dealing with a collective will. It is difficult enough to find the collective mind of a group of legislators. See *Palmer v. Thompson*, 403 U.S. 217, 224-25, 91 S.Ct. 1940, [29 L.Ed.2d 438] (1971); and see *Keyes v. School District No. 1*, supra, 413 U.S. [189] at 233-34, 93 S.Ct. 2686 [37 L.Ed.2d 548] (Powell, J., concurring). It is even harder to find the motivation of local citizens, many of whom would be as reluctant to admit that they have racial prejudice as to admit that they have no sense of humor.
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> . . . . .
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> " 'Speaking in *de jure* terms does not require us, then, to limit the state activity which effectively spells segregation only to acts which are provably motivated by a desire to discriminate. See *Wright v. Council of City of Emporia*, supra 407 U.S. [451] at 461-62, 92 S.Ct. 2196 [33 L.Ed.2d 51]. Aside from the difficulties of ferreting out a collective motive and conversely the injustice of ascribing collective will to articulate remarks of particular bigots, the nature of the "state action" takes its quality from its foreseeable effect. The Fourteenth Amendment is not meant to assess blame but to prevent injustice.' * * * ." 521 F.2d 530, 535-536.

Applying these legal principles to the facts of this case, the Court concludes that the school authorities engaged in practices with the intent and for the purpose of creating and maintaining a segregated school system, and that such practices had the effect of causing current conditions of segregation in the Milwaukee public schools. In arriving at this finding, I have considered the cumulative effect and the totality of the actions taken by the school authorities during the period 1950-1974. During this period of time there were many variables that affected the school system. The school system was changed because of annexations, blacks moved in in great numbers, whites moved out in great numbers, expressways were built, and the fertility rate, life styles, and age of the city's residents changed. The school authorities made thousands of decisions, and I am not unaware of the unending dilemmas that they faced during this traumatic period in the history of the Milwaukee schools. I am also aware that almost any school board decision can be subjected to criticism because of some racial effect, especially when viewed with the benefit of hindsight. I do not believe that it is just for a Court, after the fact, to hold school officials responsible for segregation which has occurred because of factors beyond their control. At the same time, however, where segregation has resulted from the purposeful and intentional acts of school officials, the Court is compelled to make a finding to that effect.

The record indicates that the school authorities always had a nondiscriminatory explanation for their acts. To cite but a few examples: (1) most black teachers wound up in black schools because of contractual seniority provisions which enabled white teachers to transfer out; (2) additions to black schools were built not to contain black children in separate schools but to enable them to walk to school in accordance with the objectives of the neighborhood school policy; (3) boundary lines for school districts were changed, almost invariably resulting in black schools getting blacker,

because of the increase in the number of black children; (4) the free transfer policy was adopted not to make it possible and easier for white children to leave black schools (which it did), but because the school authorities wanted to comply with a request from the NAACP; and (5) intact bussing was used not to keep black children separate from whites at the receiving school (which it did), but to enable black children to stay together because they were still part of the sending school, the bussing being only a temporary measure to relieve overcrowding until additional classrooms could be built onto the black sending schools.

These and similar explanations on an isolated basis seem reasonable and at times educationally necessary. In and of itself, any one act or practice may not indicate a segregative intent, but when considered together and over an extended period of time, they do. These acts, previously described in detail, constituted a consistent and deliberate policy of racial isolation and segregation for a period of twenty years. It is hard to believe that out of all the decisions made by school authorities under varying conditions over a twenty-year period, mere chance resulted in there being almost no decision that resulted in the furthering of integration.

In determining the question of intent in school segregation cases, many courts have utilized evidentiary presumptions and/or the much discussed test of foreseeability. See *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973); *United States v. School District of Omaha*, 521 F.2d 530 (8th Cir. 1975). In this case, however, I have not had to rely upon such devices. My finding that school authorities intended to and did maintain a segregated school system is based directly upon the empirical evidence in the record.

The question of intent, purpose, and motivation has not been a serious problem in this case because school authorities

were so straightforward, honest, and direct in their testimony at trial. The Superintendent of Education, Dr. Richard P. Gousha, and the Assistant Superintendent of Education, Dr. Dwight Teel, testified in essence that the Board of School Directors of the City of Milwaukee and its administration is, and has been since 1950, unalterably opposed to any form of forced integration and, from an educational point of view, does not believe in any substantial racial integration in the schools at this time. They further testified that neither the Board nor the Administration has ever in any significant way knowingly cooperated with any policy, program, or law, either federal or state, which had as its objective the integration of the races. They indicated that the school authorities in the past twenty years had not committed an act or adopted a practice that ever resulted in the significant integration of the schools. The superintendent stated that if the system was integrated, most of the whites would move out of the city and resegregation would follow. In taking this position, he argued that school officials were not motivated by a desire to discriminate against blacks but by an interest in a quality education for each child and a belief that this could not be accomplished in an integrated system.

School authorities claim that practically all of their decisions dealing with site selection, school construction, additions and renovations, boundary lines, and intact bussing were made in such a manner to retain the concept of a neighborhood school system in the face of a racially changing and growing population. School authorities assert that their adherence to the neighborhood school policy derives sanction from the decision of the Seventh Circuit Court of Appeals in *Bell v. School City of Gary, Indiana*, 324 F.2d 209 (1963). In that case, the Court observed at page 213 that:

> "* * * 'there is no affirmative U. S. Constitutional duty to change innocently arrived at school attendance districts by the mere fact that

> shifts in population either increase or decrease the percentage of either Negro or white pupils.'
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> * * * * * *
>
> "* * * 'the law [does not require] that a school system developed on the neighborhood school plan, honestly and conscientiously constructed with no intention or purpose to segregate the races, must be destroyed or abandoned because the resulting effect is to have a racial imbalance in certain schools where the district is populated almost entirely by Negroes or whites. * * *'"

The defendants in the present proceedings assert that after the *Bell* case was decided, the official acts of school authorities were designed to fall within the holding of that case.

The *Bell* case, however, must be read in light of the subsequent decision of the Supreme Court in *Keyes*, supra. As so read, it would appear that a "neighborhood school system" would be beyond serious constitutional attack if, and only if, the schools in the system remained essentially the same with respect to most of the factors mentioned in *Keyes*, such as teachers, facilities, staff, and boundaries. If such factors remained constant, and the change in the racial composition of the pupil populations in each school reflected only the change in the racial makeup of the attendance areas served, we can assume, for purposes of this case, that the school district would incur no liability to remedy the resulting racial imbalance.

But as soon as school officials start to make changes in school site locations, school sizes, school renovations and additions, student attendance zones, assignment and transfer

options, transportation of students, assignments of faculty and staff, etc., their actions become, in the words of Mr. Justice Powell's concurring opinion in Keyes, "constitutionally suspect." The fact that these decisions are asserted to have been in conformity with a "neighborhood school policy" does not save them from constitutional scrutiny. As Mr. Justice Powell observed in *Keyes*:

> "* * * This does not imply that decisions on faculty assignment, attendance zones, school construction, closing and consolidation, must be made to the detriment of all neutral, nonracial considerations. But these considerations can, with proper school board initiative, generally be met in a manner that will enhance the degree of school desegregation." 413 U.S. 189, 241, 93 S.Ct. 2686, 2714, 37 L.Ed.2d 548, 582.

In Milwaukee, none of these decisions ever resulted in any significant or noticeable degree of desegregation in the school system, and practically all of them resulted in greater segregation.

The defendants have argued that they are under no duty to desegregate when segregation results from factors over which they have no control. I have accepted that to be the law for purposes of this decision. I have concluded, however, that the segregation which exists in the Milwaukee school system is directly attributable to acts of the defendants.

The actions of Milwaukee school officials can be usefully contrasted with those of the school system in Grand Rapids, Michigan. In upholding the trial court's decision in favor of the school authorities in that case, the Court of Appeals placed reliance on certain steps taken to advance desegregation and to prevent further segregation. *Higgins v. Board of Education of the City of Grand Rapids*, 508 F.2d 779, 791 (6th Cir. 1974), states:

> "Here, we are convinced that defendant's neighborhood school policy was in reality racially neutral and that the affirmative action taken by school officials in the late and middle sixties to improve racial balance was not an 'abandonment' of the neighborhood system so as to preclude them from relying upon it as a valid justification for their position."

In contrast, Milwaukee school authorities were in this case not able to point to one thing they had done to prevent segregation or to desegregate the schools.

Segregation was the result of the cumulative effect of the various decisions made by school officials, and segregation that results from the actions of school authorities is illegal and unconstitutional when those actions are intended and made for that purpose. The fact that substantial segregation was considered by school authorities to be educationally necessary and a prerequisite to quality education does not make it legal. The Constitution does not guarantee one a quality education; it guarantees one an equal education, and the law in this country is that a segregated education that is mandated by school authorities is inherently unequal.

The Court concludes that the defendants have knowingly carried out a systematic program of segregation affecting all of the city's students, teachers, and school facilities, and have intentionally brought about and maintained a dual school system. The Court therefore holds that the entire Milwaukee public school system is unconstitutionally segregated.

Accordingly, contemporaneously with this decision the Court will file a partial judgment permanently enjoining the

defendants from discriminating on the basis of race in the operation of the Milwaukee public schools and ordering the defendants to forthwith begin the formulation of plans to effectively eliminate racial segregation from the public schools of Milwaukee, including all consequences and vestiges of segregation previously practiced by the defendants.

Finally, I wish to emphasize that the law governing school segregation is both well established and universal. I was astonished at trial to learn from the testimony of the Milwaukee school officials that they honestly believed that twenty years after *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), they could knowingly and intentionally operate a segregated school system because they believed it was educationally superior to an integrated system. It should be apparent to all that if school officials and others do not like this law, then they should seek to amend the United States Constitution, which I am not advocating. To pretend that the law does not exist, or that one does not have to obey it, or that courts do not have to enforce it, or to thrash around when it is enforced serves no useful purpose. If the law against intentional school segregation in unworkable, then it should be repealed. Until then it must be obeyed.

IV. FINAL MATTERS

A. *Remaining Issues*

In fairness to the parties, I would like to make brief mention of two issues which were pressed upon the Court at trial.

First, the plaintiffs urged the Court to take into account the "acts of the state" in causing segregated housing in Milwaukee which in turn contributed to school segregation. I believe that the evidence offered on this point is insufficient

to enable me to make such a finding. It was suggested that the Court take judicial notice of restrictive covenants and similar practices, as well as this Court's decision in *Otey v. Common Council of the City of Milwaukee*, 281 F.Supp. 264 (E.D.Wis.1968), which outlines the history of open housing legislation in Milwaukee. Although I have taken judical notice of the *Otey* case, I conclude that the evidence in this case is insufficient to warrant the finding that "state action" caused the segregated housing patterns in Milwaukee.

The plaintiffs also claim that segregated schools have a reciprocal effect on housing by increasing the pressures which cause segregated housing. I do not doubt that this is true, but the evidence in this record does not support such a finding.

Second, school authorities constantly alleged throughout this case that certain characteristics of black school children make their separation from other children "reasonably necessary and desirable from an educational point of view." School authorities assert that they never discriminated against black students because of the color of their skin, but that the requirements of "quality" education necessitated the separation of black school children, or as the school authorities prefer to say, "children from the lower socio-economic groups."

The following excerpt from the "Defendants' Proposed Findings of Fact and Conclusions of Law," Vol. I, section 1554, is indicative of the circumstances which school officials believe militate against the educational advisability of efforts at achieving racial integration:

> "At Peckham at this time racial incidents between teachers and pupils were common. There is so much resentment of white authority by black students that attempts to help and work with students yielded mistrust or a refusal to even

bother to hear the teacher. There were daily disturbances which forced a teacher to spend most of a class period as a referee instead of a teacher, with a curse being the usual response from a pupil to a teacher when they confront each other in the classroom. A typical teacher's day started with profanity – disruptive profanity – hard core stuff. Police were called to the school several times a month and fights broke out about three times a day. Children and teachers were threatened with metal pipes, knives and clubs. Pupils' faces were scarred when ripped by other students with metal Afro combs. An assistant principal received a broken nose during a fight with a student. At times pupils come to class drunk. * * * One teacher concluded that (a) the root of the problem is not the education programs, it is the kids who cannot operate effectively in any school; (b) they have no authority to answer to outside of the school so they don't feel they have to answer authority in the school; and (c) Peckham would be a viable unit if you could take out 200 or 300 of those kids."

The fallacy in the school authorities' reasoning is that they assume that educationally undesirable characteristics are common to all black children and that therefore they are permitted to run a segregated school system. This the law prohibits them from doing. I am not passing on the question of whether or not school authorities can separate school children based on certain behavioral or attitudinal characteristics, but in any event that is not what the Milwaukee school authorities did. They did not separate the high achievers from the low achievers, the nondelinquent from the delinquent, the manageable from the unmanageable, the passive from the violent, and the good from the bad. They just simply separated most of the blacks from most of the whites, and that they may not do under our Constitution

even if it results, on the average, in a better education for everyone.

B. *Appointment of a Special Master*

Having concluded that the Milwaukee public school system is unlawfully and unconstitutionally segregated, the Court is confronted with the formidable task of formulating a decree to remedy the wrong suffered by the plaintiff classes. In light of the enormity of that effort, the Court deems it appropriate to appoint, upon its own motion, a special master to assist it in this endeavor. 5A Moore's Federal Practice Para. 53.05[2], at 2947 (2d ed. 1975).

Rule 53(a) of the Federal Rules of Civil Procedure provides that " * * * the court in which any action is pending may appoint a special master therein." Rule 53(b), however, cautions that "[a] reference to a master shall be the exception and not the rule. * * * [A] reference shall be made only upon a showing that some exceptional condition requires it." The Court has concluded that exceptional circumstances exist in this case sufficient to justify the appointment of a master.

The formulation of a remedial decree in a school desegregation case is no mean matter. As is the case with respect to determining the existence of the constitutional wrong, the nature of appropriate and constitutionally adequate corrective measures will turn in large part on a perceptive and incisive assessment of the delicate factual circumstances involved. Although matters of mere convenience may not thwart constitutionally required corrective steps, a court of equity shall not issue a remedial decree that is factually infeasible. Moreover, once adopted, a remedial decree imposes a substantial supervisory burden on the issuing court. In the Court's opinion, the complexity of the factual details which the remedial task will entail

warrants the appointment of a special master to conduct hearings and other proceedings with a view toward making a recommendation to the Court with respect to the question of an appropriate remedial decree.

The use of a special master is not unknown in the area of school desegregation. In both the Detroit and Boston school cases, *Bradley v. Milliken*, 402 F.Supp. 1096, 1104 (E.D.Mich.1975), and *Morgan v. Kerrigan*, 338 F.Supp. 581 (D.C.Mass. 1975) (memorandum of decision and remedial orders, pp. 16-17), masters and/or experts were appointed to assist the Court in the task of formulating and evaluating remedial efforts. While in each of those cases the Court did not make the appointment until after plans and proposals had been submitted by one or both of the parties, this Court is of the opinion that justice will be best served by appointing a master at the outset of the task. In that way the master and the parties' counsel will be able to aid each other in developing an approach which will be consistent with the Constitution and responsive to the rights of the plaintiff classes.

By appointing a special master to assist in the development and implementation of a school desegregation plan, the Court does not intend to modify in any way the defendants' obligation to forthwith begin the preparation of a remedial plan. While the special master will aid in that effort, principal responsibility must rest on the defendants who have access to and are most familiar with the sizeable educational resources which the formulation of a remedial plan will require. Nor does the Court intend to foreclose the active assistance of plaintiffs' counsel whose input is equally necessary to the success of the venture.

The Court does not intend to advance any guidelines or otherwise suggest that parameters be placed upon the

remedial options which the parties and the master may consider. A court of equity is by definition flexible, and its remedial decrees should be individually tailored to the unique needs and circumstances of each case. The Court is confident that the parties and the master will be able to proceed in good faith to meet the constitutional obligation herein articulated without the need for repeated and detailed direction from this court.

To that end, the special master will be authorized to exercise a broad range of powers, subject only to the limitations imposed by law and Rule 53(c) of the Federal Rules of Civil Procedure. The powers of the special master shall include, but are not limited to, the authority to collect evidence, to conduct hearings, to seek the advice of experts, to commission studies and reports, to consult with community groups and civic organizations, and to subpoena witnesses and records. The special master should have a broad range of discretion with respect to the manner in which he carries out his assigned task, and he is hereby empowered to take whatever steps or actions he deems necessary to fulfill the responsibility imposed on him by this court. That responsibility, simply stated, is to develop a plan for the desegregation of the Milwaukee public school system, and to submit that plan to the court for its consideration. The special master will begin his efforts immediately and shall file a progress report with this court by May 1, 1976. Upon the completion and approval of a remedial plan, the special master will be responsible for the supervision of the plan's implementation and the subsequent review and evaluation of the plan's effectiveness.

Having duly considered the qualifications which the holder of this position should possess, the Court has decided to appoint Dr. John A. Gronouski, formerly of Wisconsin and now of Austin, Texas, to serve as the special master in this case. Dr. Gronouski will bring to the position the

considerable skills he has acquired and perfected in a lifetime of public service. Dr. Gronouski has at various times served as the chairman of tax study committees for the Wisconsin State Legislature, Tax Commissioner of Wisconsin, Postmaster General of the United States, the United States Ambassador to Poland, and more recently as Dean and Professor at the Lyndon Baines Johnson School for Public Affairs at the University of Texas. In addition to his expertise in the area of public administration, Dr. Gronouski will bring to the position a substantial understanding of the people and of the City of Milwaukee.

The Court directs that the costs and expenses of the special master are to be borne by the defendants. The special master will be compensated for his services at the rate of $50.00 per hour, and will be reimbursed for the necessary expenses he may incur in the course of his duties. The special master will submit a voucher to the court on a monthly basis, which voucher will be reviewed by the court and forwarded to the defendants for payment.

In addition, the defendants shall provide the special master with office space and stenographic services in the offices of the Superintendent of Schools for the City of Milwaukee, and shall furnish additional staff and services as the need arises.

C. *Entry of Partial Judgment and Certification of Appeal*

This Court fully recognizes that the action it has taken today in ruling that the Milwaukee public school system is unconstitutionally segregated may well be disputed by those who are parties to this suit. It also recognizes that its remedial efforts may well be for naught if the determination of liability is ultimately reversed on appeal. At the same time, however, this Court cannot in good conscience hold in abeyance the question of formulating an appropriate remedy

to correct the constitutional violations visited upon the plaintiff classes. The Court deems it proper to take certain steps to facilitate appellate review of the liability portions of its decision in the event that either or both parties choose to appeal, but the taking of an appeal or appeals shall in no way abate or otherwise affect the obligation of the defendants to forthwith begin formulation of a plan to secure the plaintiffs' constitutional rights, nor shall an appeal affect the powers and responsibilities conferred upon the special master.

In attempting to effectuate its intentions, the Court is faced with three avenues of appellate review, each of uncertain proportions. In such circumstances it is appropriate for the Court to act in the alternative. 9 Moore's Federal Practice Para. 110.22[5], at 265-267 (2d ed. 1975). In so doing, the Court is seeking to avoid the injustice to the parties which might follow from an error of judgment on its part with respect to the subtleties of appellate jurisdiction.

As previously noted, the Court will file a partial judgment permanently enjoining the defendants from discriminating upon the basis of race in the operation of the Milwaukee public schools. While it is admittedly unclear whether such a judgment is appealable of right as a final judgment under Rule 54(b) of the Federal Rules of Civil Procedure, cf. *Perma Research and Development Co. v. Singer Co.*, 410 F.2d 572 (2d Cir. 1969), the Court will nevertheless hereby expressly determine that there is no just reason for delaying the entry of such judgment and directs that judgment be so entered.

Even if this action in inappropriate for treatment as a final judgment under Rule 54(b), it may well be appealable of right under the provisions of 28 U.S.C. Section 1292(a)(1) as an interlocutory order granting an injunction. *Spangler v. United States*, 415 F.2d 1242 (9th Cir. 1969).

If an appeal of right does not exist under Section 1292(a)(1), the Court considers this case to be a fit candidate for certification under 28 U.S.C. Section 1292(b). The issues here decided are of public importance, concerning as they do the duties imposed upon school officials by the Constitution. *Springfield School Committee v. Barksdale*, 348 F.2d 261, 262 (1st Cir. 1965); *Board of Managers of Arkansas Training School for Boys v. George*, 377 F.2d 228, 229 (8th Cir. 1967). The Court accordingly states that today's order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

CRAIG AMOS and JEFFREY AMOS, et al.,

Plaintiffs,

v.

PARTIAL JUDGMENT
C.A. No. 65-C-173

BOARD OF SCHOOL DIRECTORS OF THE CITY OF MILWAUKEE, et al.,

Defendants.

This action came on for trial before the Court, the Honorable John W. Reynolds, Chief Judge presiding, and the issues having been duly tried and a decision having been duly rendered, as set forth in a decision and order filed of even date herewith, that the rights of the plaintiffs under the Fourteenth Amendment to the Constitution of the United States have been and are being violated by the defendants in their management and operation of the public schools of the City of Milwaukee,

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that the defendants Donald J. O'Connell, Thomas Brennan, Anthony S. Busalacchi, Margaret Dinges, Gerald P. Farley, Stephen Jesmok, Jr., Marian McEvilly, Maurice J. McSweeney, Edward S. Michalski, Clara A. New, Evelyn T. Pfeiffer, Lorraine M. Radtke, Lois Riley, Doris Stacy, and Leon W. Todd, Jr., Members of the Board of School Directors of the City of Milwaukee, Lee R. McMurrin, Superintendent of Schools for the City of Milwaukee, and Thomas A. Linton, Secretary-Business Manager of the Board of School Directors of the City of Milwaukee, their officers,

agents, servants, employees, attorneys, and all other persons in active concert or participation with them who receive actual notice of this judgment and order, be and they hereby are permanently enjoined from discriminating upon the basis of race in the operation of the public schools of the City of Milwaukee, and from creating, promoting, or maintaining racial segregation in any school or other facility in the Milwaukee school system.

IT IS FURTHER ORDERED AND ADJUDGED that in accordance with the decision and order entered this date, the defendants are to begin forthwith the formulation of plans which shall eliminate every form of racial segregation in the Milwaukee public school system, including all vestiges and consequences of segregation previously practiced by the defendants.

APPROVED: January 19, 1976

.....
John W. Reynolds
Chief U.S. District Judge

Dated at Milwaukee, Wisconsin, this 19th day of January, 1976.

RUTH W. LA FAVE, Clerk of Court

By: .....
Deputy Clerk

Kevin ARMSTRONG et al.,

Plaintiffs,

v.

Donald J. O'CONNELL et al.,

Defendants,

Milwaukee Teachers' Education Association, Undesignated Intervenor.

Civ. A. No. 65-C-173.

United States District Court,
E. D. Wisconsin.

June 11, 1976.

ORDER

This matter came on for hearing on June 9, 1976, pursuant to Court direction, for the announced purposes of (1) adopting, modifying, or rejecting the recommendations made by the special master in his May 24, 1975, progress report; and (2) acting upon plaintiffs' motions dated May 7, 1976, seeking an order for (a) the cessation of all activities relating to the planning and construction of four school projects, and (b) a stay of action upon the student transfer policies enacted by the Milwaukee Board of School Directors on May 4, 1976.

The special master at the commencement of the hearing publicly withdrew a substantial portion of his recommendations of May 24, 1976, and submitted a second progress report dated June 9, 1976.

During the course of the proceedings held, the Court announced various orders as hereinafter set forth.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. *Faculty Desegregation*

Effective immediately, all faculty vacancies will be filled with reference to seniority unless a transfer would not help to promote in the faculty of the school in which the vacancy exists a racial percentage within 5% of the percentage of black teachers within the entire school system. If excessing occurs, those teachers excessed due to a drop in enrollment will be placed in accordance with the foregoing procedure. If the racial composition of excess teachers and teachers returning from leave precludes adherence to the foregoing procedure, then they shall be placed in accordance with pre-existing practice.

2. *Student Desegregation*

By June 30, 1976, the defendants shall file with the court a plan for student desegregation of the Milwaukee public school system. This plan shall describe in general terms the steps the defendants propose to take to accomplish the complete desegregation of the Milwaukee public school system by September 30, 1978. In addition, the plan shall describe in specific detail the steps the defendants propose to take in September 1976. On July 7, 1976, at 10:00 A.M., the Court will hold a hearing on the plan so submitted in Courtroom 425 of the Federal Building, 517 East Wisconsin Avenue, Milwaukee, Wisconsin.

The number of schools having a student population between 25% to 45% black shall be deemed indicative of the extent of the desegregation of the school system. The plan which the defendants submit should cause at least one-third

of the schools in the system to have student populations falling within the foregoing racial range by September 30, 1976, at least an additional one-third of the schools to have student populations within that racial range by September 30, 1977, and the remaining schools to have student populations within that racial range by September 30, 1978.

Nothing contained herein shall be construed to prohibit the defendants from incorporating in their plan means and mechanisms of their own choice, including, but not limited to, magnet or specialty schools so long as the plan produces a result which is in accordance with the foregoing objectives.

3. *Plan Analysis*

The student desegregation plan filed by the defendants should be accompanied by an analysis of the plan's effectiveness in achieving schools having student populations which are between 25% and 45% black. In particular, the analysis should include a table which lists for each school in the system: (a) the actual enrollment of that school in the school year just ending; (b) the percentage of black students in that school in the school year just ending; (c) the enrollment which is projected for that school on September 30, 1976, in the event that the defendants' plan is adopted; and (d) the projected percentage of black students enrolled in the school on September 30, 1976.

4. *Staff Assistance*

The defendants are hereby ordered to make available to the special master, upon request, the unrestricted services of the administrative staff of the Milwaukee public school system. Such services may be requested on matters including, but not limited to, supplying factual data, analysis or organization of factual data, advice and/or opinions regarding the probable desegregation impact of proposed plans,

programs or policies, and the creation of materials not presently in existence. The defendants are enjoined from interfering in any way with requests of the special master made pursuant to this paragraph.

5. *School Construction*

Construction projects currently underway at North Division High School and South Division High School are hereby permitted to continue until further order of this court. Until such time as an interim plan of student desegregation is adopted by order of this court, any other activities which relate in any way to the construction, modification and/or improvement of school buildings and facilities in the Milwaukee public school system are hereby enjoined.

6. *Desegregation Financing*

The defendants are to submit to the court a statement detailing the proposed financing of the desegregation of the Milwaukee public school system.

7. *Student Transfer Policies*

The plaintiffs' motion of May 7, 1976, concerning the defendants' student transfer policy is held in abeyance pending the defendants' submission to the court of their plan for September 1976 desegregation.

8. *Desegregation Monitoring*

In order that the special master may properly monitor and evaluate desegregation efforts, the defendants are ordered to maintain records and prepare evaluation reports for the special master of the kind and in the manner that the special master shall prescribe.

Kevin ARMSTRONG et al.,

Plaintiffs,

v.

Donald J. O'CONNELL, et al.,

Defendants,

Milwaukee Teachers' Education Association, Undesignated Intervenor.

Civ. A. No. 65-C-173.

United States District Court,
E. D. Wisconsin.

July 9, 1976.

ORDER

REYNOLDS, Chief Judge.

On June 29, 1976, the defendants in the above-captioned action filed with the court a document entitled "Preliminary Recommendations for Increasing Educational Opportunities and Improving Racial Balance" (hereinafter referred to as the "Preliminary Recommendations"). Written comments on the Preliminary Recommendations were solicited from and filed by the Special Master and counsel for all parties of record. A hearing was held with respect to the Preliminary Recommendations on July 7, 1976, at which time counsel was afforded the opportunity to make oral presentations to the Court. Upon the basis of the aforementioned documentary materials and oral presentations,

IT IS ORDERED:

1. STUDENT DESEGREGATION – Giving due consideration to the defendants' expressed good faith and their declared intention to actively involve parents, teachers, teacher representatives, school administrative personnel, and other community groups in the implementation of the order of this Court dated June 11, 1976, the defendants shall commence the process of student desegregation of the Milwaukee public school system in accordance with the concepts embodied and the procedures set forth in Appendices C and D and at pages 10-14 of the main body of the Preliminary Recommendations.

The foregoing order is limited, however, to those steps which defendants propose be taken during the 1976-1977 school year. With respect to those portions of the Preliminary Recommendations which relate to the 1977-1978 and 1978-1979 school years, the absence of greater detail makes it impossible for the Court to determine whether the measures adumbrated therein will be sufficient to achieve the objective of the complete desegregation of the Milwaukee public school system by September 30, 1978, which objective is contained in the Court's order of June 11, 1976. In light of that fact, the Court will abstain from any consideration of the merits of the defendants' proposals for action to be taken during those two years pending the submission of a more detailed description thereof.

The Court is convinced, however, that those portions of the Preliminary Recommendations which outline a process for initiating the desegregation effort in the 1976-1977 school year constitute a good faith effort at achieving significant and substantial progress towards the goal which the Court has established. It is appropriate, therefore, that the defendants shall proceed accordingly.

2. MODIFICATION PROCEDURE – In the event the defendants wish to modify or otherwise alter the provisions for September 1976 desegregation as contained in Appendices C and D and at pages 10-14 of the main body of the Preliminary Recommendations, they shall file with the court and serve upon the Special Master and counsel of record a detailed description of the proposed modification or alteration. Within five days thereafter, the Special Master, or any party, may serve upon the defendants and file with the court a written objection thereto.

If a written objection is made within the five-day period, it must be followed, within an additional five days, by a written statement detailing the precise grounds of the objection. Upon the filing of such a statement with the court and service upon the Special Master and counsel, the parties and the Special Master shall meet and attempt to negotiate the disagreement. In the event that agreement cannot be reached, the Special Master shall so notify the Court and the matter will be taken up by the Court as promptly as possible, with implementation of the proposed modification or alteration held in abeyance pending the Court's approval thereof. If, however, agreement is reached and the proposed modification or alteration does not conflict substantively with any outstanding order of the Court, the parties shall file with the court a stipulation to that effect, in which event the modification or alteration shall be deemed part of the desegregation process authorized by the preceding section and may be immediately implemented without the need for additional court action or approval.

If the defendants do not receive written objection within the aforementioned five-day period and the proposed modification or alteration does not conflict substantively with any outstanding order of the Court, the modification or alteration shall be deemed part of the desegregation process authorized by the preceding section and may be immediately implemented without the need for additional court action or approval.

3. CONSTRUCTION – The injunction imposed on certain construction projects in this Court's June 11, 1976, order is hereby revoked as to all construction except Vincent High School. As to Vincent High School, the defendants shall submit to all parties, the Special Master, and the Court, as expeditiously as possible, an impact statement concerning the expected effect of the construction of Vincent High School on future desegregation efforts, which statement shall contain at least the following information:

(a) The student body racial percentages of Vincent High School were it operating today given the planned feeder pattern, and a description of said pattern – the student body racial percentages shall be by grades, if that information is available;

(b) The student body racial percentages of Vincent High School were it to open in 1978 given the planned feeder pattern and taking into account the predicted racial changes in the residential area which would feed Vincent High School – the student body racial percentages shall be by grades, if that information is available;

(c) The present plans, if any, for obtaining racial balance at Vincent High School;

(d) The anticipated career specialty, if any, to be implemented at Vincent High School, and the source of the students who will be participating in that specialty program;

(e) The anticipated effect, if any, of intra and inter-district transfers on the student body racial percentages at Vincent High School; and

(f) The method of any student transportation required by any of the above.

After transmittal of the impact statement to all parties, the Special Master, and the Court, the procedures and time sequence for objecting to proposed modifications as set forth in paragraph 2 above shall apply, and the failure to so object shall be deemed to be an acquiescence by the parties and the Special Master in the revocation of the injunction. Absent any such objection or request by the Court for hearing thereon within the first five-day period, the injunction on Vincent High School construction shall be automatically revoked. If an objection is filed, the parties and the Special Master shall attempt to resolve the same through conferences, and any agreed upon modifications or additions shall be submitted to the Court, and the injunction shall thereupon be lifted unless the Court requires a hearing.

4. DESEGREGATION FINANCING – The defendants are ordered to use the unappropriated December 31, 1975, school budget surplus of $3,564,976 to finance the desegregation planning and the implementation herein ordered.

5. FACULTY ASSIGNMENT AND TRAINING – Representatives of the Milwaukee Teachers' Education Association (hereinafter "MTEA") and the defendants shall promptly meet for the purpose of resolving differences between them with regard to staffing and inservice education. Good faith efforts to resolve these differences shall be completed by July 19, 1976. In the event the MTEA and the defendants cannot reach agreement on these matters by July 19, 1976, the Special Master shall, upon the request of either party, and after conferring with each, promptly resolve the dispute, such resolution to be achieved by July 21, 1976. The plaintiffs shall be given an opportunity to meet and confer with the Special Master prior to the issuance of his decision if he is required to act on this subject.

6. FUTURE DESEGREGATION PLANNING – On or before December 1, 1976, the defendants shall submit to the Court a detailed memorandum describing the steps defendants propose to take in order to complete the process of the desegregation of the Milwaukee public school system by September 30, 1978. The memorandum should specifically include provisions for the desegregation of administrative and other supportive school personnel not encompassed by the faculty desegregation provisions of the Court's order of June 11, 1976.

The Defendants shall also include in the aforementioned memorandum specific items or topics relating to future desegregation efforts designated by the Special Master in written notice served on the defendants prior to November 1, 1976.

7. STATUS REPORT – On August 18, 1976, at 2:00 P.M., a status report will be held in chambers, Room 471, Federal Building, Milwaukee, Wisconsin. The Special Master and counsel shall be prepared to make a report to the Court at that time with respect to the progress of desegregation efforts.

8. PREVIOUS ORDERS – Previous orders of the Court not inconsistent with this order shall remain in full force and effect.

9. CONCLUDING COMMENTS – This order and the Court's order of June 11, 1976, constitute a final order directing the defendants to implement a plan for commencing the desegregation of the Milwaukee public school system during the 1976-1977 school year. This Court is aware of The Emergency School Aid Act, 20 U.S.C. Section 1601, et seq., and it has issued this order with an awareness of the requirements for receiving such federal aids.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-809

THOMAS BRENNAN, *et al., Petitioners,*

vs.

KEVIN ARMSTRONG, *et al., Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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OPINIONS BELOW

The two district court orders referred to in the last sentence of the opinions below section of the petition (Pet. 2)[1] are not before this Court for review. Petitioners have never appealed from these orders. The court of appeals' decision which petitioners request this Court to review affirmed a district court order entered several months prior to these two orders.

QUESTIONS PRESENTED

Respondents do not accept petitioners' statement of the questions presented. (Pet. 2-3). Petitioners' first two questions, which deal with segregative intent, are each

[1] As used in this brief, the abbreviation "Pet." refers to the petition for a writ of certiorari. The abbreviation "A." refers to petitioners' appendix to that petition.

stated in terms of selective findings of fact instead of the entire factual basis from which both courts below found segregative intent. These two questions are subsumed by respondents' first restated question. Petitioners' third question is improperly stated because it refers to remedial standards which have not been presented to the court of appeals for review.

Respondents' restatement of the issues discussed in the petition is as follows:

1. Did the court of appeals err in affirming the district court's finding that petitioners engaged in practices with the intent and for the purpose of maintaining a segregated school system?

2. Did the court of appeals err in affirming the district court's finding that the school system as a whole was segregated in fact?

3. Did the court of appeals err by applying the clearly erroneous standard to review the district court's finding of segregative intent?

STATEMENT OF THE CASE

This is a school desegregation suit involving the Milwaukee Public School System. The suit's procedural history is adequately described in petitioners' statement of the case. (Pet. 6-7). Aside from this, petitioners' statement of the case is unacceptable. It is largely argumentative and distorts the basis for the lower courts' decisions. It also contains a selective and incomplete presentation of the facts found by the courts below.

Omitted from petitioners' statement is a description of the racial concentration of students and teachers within

the Milwaukee Public School System. The courts below found that thirty-five percent of the system's students were black. (A. 2-3, 41). Of these black students, 80% attended majority black schools and over 75% attended schools that were 80% or more black. (A. 3). Approximately 19% of the elementary schools were over 90% black, and 59% were less than 10% black. Over 30% of the junior high schools were 67-100% black, and of these two-thirds were more than 90% black. Over 50% of the junior high schools were less than 10% black. Only 27% of the system's high school students were black. Eight of fifteen high schools were less than 10% black, and two were over 90% black. (A. 3, 12, 108, 109).

Black teachers comprised approximately 800, or 15%, of the system's 5700-5800 teachers. (A. 12, 73). Eighty percent of the black elementary school teachers taught in schools with black pupil percentages of over 80%, and more than 70% of the black secondary school teachers were assigned to secondary schools having black pupil percentages of over 80%. (A. 12). During the year preceding trial, only 24 black elementary school teachers and 24 black secondary school teachers were assigned to schools attended by a majority of white students. Fifty-six of the system's 129 elementary schools had all-white faculties. (A. 80).

Petitioners' statement also distorts the basis for the lower courts' decisions by incorrectly implying that both courts below found that the mere application of a neighborhood school policy was unconstitutional. (Pet. 11-13). The district court based its finding of segregative intent on numerous actions taken by petitioners over the last 20 years which were intended to and did result in school segregation. (A. 126-130). These decisions included

school site selection, construction of new schools, additions to existing schools, renovation of old schools, redistricting and boundary changes, intact busing, faculty assignment, and transfer policies. (A. 127-128). The court of appeals reexamined these actions and affirmed the trial court's decision. (A. 4-20).

ARGUMENT

I. THE FINDING THAT PETITIONERS ADMINISTERED THE SCHOOL SYSTEM WITH SEGREGATIVE INTENT IS CORRECT, AND FURTHER REVIEW OF THAT FINDING IS UNWARRANTED.

A. Both Lower Courts Found That Petitioners' Actions Were Motivated By Segregative Intent.

One of the elements which must be proved to establish unconstitutional segregation is an intent to segregate. *Keyes v. School District No. 1, Denver,* 413 U.S. 189, 205 (1973). The district court found "that school authorities engaged in practices with the intent and for the purpose of creating and maintaining a segregated school system." (A. 125). Upon review, the court of appeals affirmed this finding. (A. 19-20). This Court, under its two-court rule, should not disturb this finding.

B. The Court Of Appeals Correctly Applied Standards Recently Enunciated By This Court In Affirming The Finding Of Segregative Intent.

Petitioners contend that the court of appeals merely found a racially disproportionate impact in the Mil-

waukee Public School System and, therefore, found only *de facto* segregation. The court of appeals, however, reviewed the district court's findings in light of *Washington v. Davis,* 426 U.S. 229 (1976), and expressly noted that intent to segregate was the differentiating factor between *de jure* and *de facto* segregation. (A. 13). It also acknowledged that if "racial effects were not intended as such but were merely an unavoidable result . . ., they cannot be said to be indicative of segregative intent." (A. 17). The court of appeals did not substitute the existence of a disproportionate impact for segregative intent. Instead, it examined various school board actions in terms of the "totality of relevant facts" test announced in *Washington v. Davis,* (A. 13-19), and held that the district court's finding of segregative intent was not clearly erroneous. (A. 19-20).

Judge Phillip W. Tone was the author of the court of appeals' decision. Two weeks prior to the issuance of its opinion in this case, the court of appeals rendered its decision in *United States v. Bd. of Sch. Com'rs of City of Indianapolis,* 541 F.2d 1211 (7th Cir., 1976), petitions for cert. filed 45 U.S.L.W. 3372-3373 (U.S. Oct. 13 & 14, 1976) (Nos. 76-515, 76-520). Judge Tone dissented in *Indianapolis* because he felt that statistical impact, but not segregative intent, had been proved His dissent, which was based largely on *Washington v. Davis,* discussed at length the legal distinction between discriminatory purpose and discriminatory impact. 541 F.2d at 1224-1229. To assert, as petitioners do, that the court of appeals' reference to *Washington v. Davis* is "rhetoric," (Pet. 17), therefore, is without merit.

C. Both Lower Courts Found That Petitioners' Neighborhood School Policy Was Not Neutrally Applied And That Petitioners Made Segregatorily Motivated Decisions In Areas Unrelated To Their Neighborhood School Policy. Therefore, Petitioners' Adherence To Their Neighborhood School Policy Did Not Preclude A Finding Of Segregative Intent.

Petitioners contend that the district court found a "good faith adherence to a racially neutral neighborhood school policy." (Pet. 17). They further assert that this finding precludes a finding of segregative intent. (Pet. 21). Neither lower court found that petitioners' policy was racially neutral. Each found, instead, a pattern of decision-making imbued with segregative intent.[8] (A. 19-20, 128-131).

1. Both lower courts found that deliberately segregative choices were made within the parameters of Milwaukee's neighborhood school policy.

The Milwaukee neighborhood school policy, as found by both lower courts, was to assign students to schools within a reasonable walking distance of their homes. (A. 4, 43). The parameters of this concept are broad. Within

[8] This finding of intent distinguishes this case from Diaz v. San Jose Unified School District, 412 F. Supp. 310 (N.D. Cal., 1976), appeal docketed, No. 76-2148, 9th Cir., May 24, 1976, cited by petitioners (Pet. 18n.11, 20n.13). In *Diaz*, the district court found that the board applied the neighborhood school policy neutrally because the record disclosed no attempts to gerrymander attendance boundaries or otherwise manipulate attendance areas so as to lock in minorities or freeze segregated school patterns. 412 F. Supp. at 334. In this case, both lower courts found that the neighborhood school policy was not neutrally applied and was used by the school board to "contain" black students. (A. 15-20, 50, 128-131).

the framework of this policy, choices were made as to size of schools, construction of new schools and additions to existing schools, the location of boundaries, and when these choices should be implemented.[9] In examining actions taken by petitioners, the court of appeals noted the flexibility petitioners had in applying their neighborhood school policy. (A. 18).

The district court reviewed actions taken by petitioners within the parameters of their neighborhood school policy and determined that they administered the school system with segregative intent. (A. 129-131). The district court observed that "none of these decisions ever resulted in any noticeable degree of desegregation and practically all of them resulted in greater segregation." (A. 129). The district court also found that petitioners consistently took actions which kept black students from spreading to schools throughout the city. (A. 50). The redistricting of Washington-Marshall high schools was cited as an example of this. (A. 50-51). The district court also pointed to Pierce and Holmes elementary schools as an example of how boundary changes and construction decisions were used to maintain two one-race schools, one predominantly white and one predominantly black, in immediate proximity to each other. (A. 112). A boundary study was also cited by the district court to demonstrate that almost half of the 63 boundary changes studied increased the concentration of black students in ghetto schools, while in the remainder all but one had no effect on racial make-up. (A. 112-113).

[9] Empirical evidence in the record shows that school districts could be as small as seven city blocks or encompass more than 40 city blocks; elementary schools could accommodate as few as 159 students or more than 1,000 students; and schools could have as few as 12 classrooms or as many as 39 classrooms. The record also indicates that a student's "neighborhood school" was not necessarily the closest school to his home.

The court of appeals reexamined petitioners' actions and concurred with the district court's finding of segregative intent. The court of appeals noted that petitioners' neighborhood school policy was flexibly administered, (A. 18), and indicated that there were several instances in the record where petitioners chose the most segregative option when less segregative options were available within the framework of their neighborhood school policy. (A. 18). Like the district court, the court of appeals also gave credence to a boundary study showing that the effect of boundary changes, with few exceptions, either increased racial imbalance or had no effect. (A. 4-6). Moreover, the appellate court stated that these segregative decisions were "attempt[s] to insulate white students from attending schools with large numbers of blacks" and were consistent with testimony from which it could be reasonably inferred that the school board believed that "any large influx of black students into white schools would lower the quality of education available to white students there and would eventually cause them to leave those schools." (A. 15).

2. Both lower courts found that petitioners made deliberately segregative decisions in areas unrelated to their neighborhood school policy.

Petitioners' neighborhood school policy did not govern decisions as to student transfer, faculty assignment or busing. Both lower courts found that these decisions were made with segregative intent. Petitioners' contention that intact busing, open transfer and faculty assignment were racially neutral policies, thus, is contrary to findings made below.

Intact busing consisted of busing students and teachers as an intact class to a school outside of their neighborhood (A. 7, 61). The trial court found that during 1950-1969 pupils involved in intact busing programs because of overcrowding or modernization of their neighborhood schools were returned to their neighborhood schools during lunch time even at times when lunch facilities were available at the school to which they were bused. (A. 65). The court of appeals affirmed this finding. (A. 7).[4] A disproportionately large percentage of intact busing involved students from black schools. (A. 8, 63-66). Moreover, the court of appeals found that intact busing was a method of "quarantining whites from large numbers of blacks who were bused into white schools" and cited this practice as another example of the school board's attempt to insulate white students from attending classes with substantial numbers of black students. (A. 15).

Both lower courts also found that the open transfer policy[5] proved to be a vehicle for white students to transfer out of schools attended largely by blacks to schools attended largely by whites. (A. 16, 69).[6] The court of appeals noted testimony from which it could be inferred that petitioners' refusal to modify this policy was due to their desire not to impede white parents from withdrawing their children from racially mixed schools. (A. 16).

[4] Thus, petitioners' contention that black students involved in intact busing programs mixed with receiving school students during lunch (Pet. 25n.16) is misleading.

[5] The open transfer policy replaced a free transfer system under which the school administration exercised the final decision as to transfers. (A. 8, 67).

[6] Petitioners argue that the district court improperly concluded that the open transfer policy was a substantial cause of segregation because

Both lower courts found that teacher assignments were likewise not entirely made in accordance with racially neutral principles. (A. 17, 125-129). Petitioners attempt to blame teacher racial imbalance on their collective bargaining agreement with the teachers. (Pet. 27-28). However, teacher racial imbalance was found to have existed before petitioners entered into the collective bargaining agreement. (A.17). This agreement, moreover, did not govern a significant number of teacher assignments, (A. 10), and the court of appeals stated that it could be inferred that these assignments were not made in accordance with racially neutral principles. (A. 17).

3. Petitioners' pattern of segregative decision-making and their testimony formed an adequate basis for the finding of segregative intent made by both lower courts.

From the totality of petitioners' actions, the district court properly found segregative intent. The district court stated:

> In and of itself, any one act or practice may not indicate a segregative intent, but when considered together and over an extended period of time, they do. These acts, previously described in detail, constitute a consistent and deliberate policy of racial isolation and segregation for a period of 20 years. (A. 126).

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the evidence showed that racial percentages in many schools were improved by the use of open transfers. (Pet. 29). The district court's finding was that the 1972 study of open transfers revealed that this program played a significant part in producing racial imbalance at the secondary school level, contributed to the increase in black student concentration in at least six secondary schools, and facilitated the flight of white students from black schools at a point in time preceding a comparable departure of white residents from black neighborhoods. (A. 111). With few exceptions, the improvements noted by petitioners were statistically insignificant.

The court of appeals reexamined at length the actions cited by the trial court and affirmed the trial court's finding of segregative intent. (A. 13-20). In affirming this finding, the court of appeals stated:

> Viewing all the evidence, including the statistics showing racial imbalance in the Milwaukee Schools, which is one factor the court may consider in determining whether *de jure* segregation exists, . . . we conclude that the District Court was not clearly erroneous in finding that defendants acted with the intent of maintaining racial isolation. While arguably no individual act carried unmistakable signs of racial purpose, it was not unreasonable to find a pattern clear enough to give rise to a permissible inference of segregative intent. (A. 19-20).

This pattern of decision-making was consistent with evidence from which, as the court of appeals noted,

> . . . it can be inferred that the prevailing belief of the Board was that any large influx of black students into white schools would lower the quality of education available to white students there and would eventually cause them to leave those schools. A natural consequence of this belief, the District Court could properly find, was to attempt to insulate white students from attending schools with large numbers of blacks. *The court could properly infer from the record a connection between this belief and such actions as transferring white residential blocks from black schools to schools with a higher percentage of whites, allowing white students to transfer out of black schools, and intact busing, quarantining whites from large numbers of blacks who were bused into white schools.* (A. 15). [emphasis supplied]

Thus, both courts below found segregative intent based on the totality of evidence presented during the 30-day trial before the district court. Further review of this factual determination is not warranted.

D. The Method Employed By Both Lower Courts In Finding Segregative Intent Was Consistent With That Utilized In Other Northern School Desegregation Cases.

The lower courts' finding of segregative intent from a pattern of decision-making is consistent with the method employed in other northern school desegregation cases.[7] In these cases courts based their findings of segregative intent on school officials' actions regarding boundary changes, school sitings, faculty assignments, and transfer policies. Thus, this is a typical northern desegregation case.

Petitioners' contention that the court of appeals' decision in this case is inconsistent with the court of appeals' earlier decision in *Bell v. School City of Gary, Indiana,* 324 F.2d 209 (7th Cir., 1963), *cert. denied* 377 U.S. 924 (1964), (Pet. 18-20), is erroneous. In *Bell,* the district court examined various actions taken by Gary school officials and specifically found that they were made without an intent to segregate. *Bell,* 213 F.Supp. 819, 826 (N.D. Ind., 1963). The court of appeals in *Bell* reexamined these actions and concurred with the trial court. 324 F.2d at 213. In the instant case, however, both lo ver courts examined various school board actions and specifically found that they were taken with an intent to segregate.

[7] *See* Davis v. School District of City of Pontiac, Inc., 443 F.2d 573, 576 (6th Cir., 1971), cert. denied 404 U.S. 913 (1972); United States vs. Board of Sch. Com'rs of Indianapolis, 474 F.2d 81, 84 (7th Cir., 1973), cert. denied 413 U.S. 920 (1973); Morgan v. Kerrigan, 509 F.2d 580, 592 (1st Cir., 1974), cert. denied 421 U.S. 963 (1975); and Oliver v. Michigan State Board of Education, 508 F.2d 178, 183 (6th Cir., 1974), cert. denied 421 U.S. 963 (1975).

E. The Conflict Among The Circuits Asserted By Petitioners Is Illusory And, In Any Event, Does Not Affect This Case.

Petitioners assert that there is a conflict among the circuits as to the meaning of the words "purpose or intent to segregate." (Pet. 15). A reading of the petition, however, indicates that the asserted conflict is not as to the definition of segregative intent. The claimed conflict concerns whether the foreseeability doctrine can be employed in proving that intent. (Pet. 15-17).

The foreseeability doctrine essentially provides that intent *may* be inferred from the foreseeable consequences of consciously consummated acts. This inference is not conclusive and may be rebutted. Although acknowledging that the doctrine has been employed in other desegregation cases, the district court stated:

> In this case, however, I have not had to rely upon such devices. My finding that school authorities intended to and did maintain a segregated school system is based directly upon the empirical evidence in the record. (A. 126).

The court of appeals similarly did not rely on the doctrine, and its opinion does not even mention it. The correctness of the doctrine is, thus, only of academic importance here. It is a false issue in this case. Moreover, the decisions of the six circuits which have relied upon the doctrine in desegregation cases[8] are consistent

[8] United States v. Bd. of Sch. Com'rs of Indianapolis, 474 F.2d 81, 84-85 (7th Cir., 1973), cert. denied 413 U.S. 920 (1973); United States v. School District of Omaha, 521 F.2d 530, 535-536 (8th Cir., 1975), cert. denied 423 U.S. 946 (1975); Oliver v. Michigan State Bd. of Ed., 508 F.2d 178, 182 (6th Cir., 1974), cert. denied 421 U.S. 963 (1975); Hart v. Community School Bd of Ed., N.Y. Sch. Dist. No. 21, 512 F.2d 37, 50-51 (2d Cir., 1975); Morgan v. Kerrigan, 509 F.2d 580, 589 (1st Cir., 1974), cert. denied 421 U.S. 968 (1975); United States v. Texas Education Agency, 532 F.2d 380, 388 (5th Cir., 1976), vacated sub nom. Austin Independent School District v. United States, 45 U.S.L.W. 3413 (U.S., Dec. 6, 1976) (No. 76-200).

with decisions of this Court in other contexts.[9] They are not in conflict with the cases cited by petitioners.[10] The conflict perceived by petitioners is, therefore, illusory.

[9] *See* Radio Officers' Union of Commercial Telegraphers Union, A.F.L. v. N.L.R.B., 347 U.S. 17, 45 (1954); Apex Hosiery Co. v. Leader, 310 U.S. 469, 485 (1940); N.L.R.B. v. Great Dane Trailers, 388 U.S. 26, 33 (1967); Cramer v. United States, 325 U.S. 1, 31 (1945); Cox v. Louisiana, 379 U.S. 559, 567 (1965); Allen v. United States, 164 U.S. 492, 496 (1896). *See also* Milliken v. Bradley, 418 U.S. 717, 738n.18 (1974), where this Court approved the district court's findings of unconstitutional segregation in the Detroit School System. The district court's findings as to intent were based on the foreseeability doctrine. Bradley v. Milliken, 338 F.Supp. 582, 587, 592 (E.D. Mich., 1971).

[10] The Ninth Circuit's decisions in Soria v. Oxnard School District Board of Trustees, 488 F.2d 579 (9th Cir., 1973), cert. denied, 416 U.S. 951 (1974); Johnson v. San Francisco Unified School District, 500 F.2d 349 (9th Cir., 1974); and Berkelman v. San Francisco Unified School District, 501 F.2d 1264 (9th Cir., 1974), do not conflict with cases recognizing the foreseeability doctrine. In *Soria,* plaintiffs argued that defendants' segregative intent could be inferred from the foreseeable consequences of defendants' acts. The Ninth Circuit did not reject that proposition. It merely held that when defendants are prepared to introduce evidence showing they did not act with an intent to segregate, there is a disputed issue of material fact that precludes the granting of summary judgment for plaintiffs. 488 F.2d at 585. To have held otherwise would have improperly given conclusive, irrebuttable effect to the inference arising under the foreseeability doctrine. In *Johnson,* the district court treated proof of segregative intent as unnecessary, and the Ninth Circuit therefore reversed and remanded the case for a finding as to segregative intent. 500 F.2d at 351-352. In *Berkelman,* the Ninth Circuit affirmed the trial court's findings that the standards for admission to an academic high school were neither an intentionally discriminatory standard nor a neutral standard applied in a discriminatory manner. 501 F.2d at 1266-1267. This finding was based in part upon the fact that the high school had a "pilot minority admissions program." In effect, both courts in *Johnson,* unlike the courts here, felt that the school board's evidence was more compelling than the case presented by plaintiffs.

Higgins v. Board of Education of City of Grand Rapids, 508 F.2d 779 (6th Cir., 1974), is not inconsistent with the cases recognizing the foreseeability doctrine, including *Oliver,* which was decided by the Sixth Circuit three days after *Higgins.* The panel in *Higgins* recognized that a court may infer segregative intent from all the circumstances. 508 F.2d at 793. It upheld a district court's finding of no intentional segregation because the evidence introduced by the school board, which included various integration programs adopted by it, outweighed plaintiffs' proof and indicated that the board policies were in reality neutral. 508 F.2d at 791, 793.

F. The Presumption Of Consistency Is Not Novel, And Its Use Did Not Result In A Misreading Of The District Court's Decision.

The district court's finding regarding adherence to the neighborhood school policy stated that petitioners had consistently and uniformly adhered to a policy, the essence of which was to "assign students to schools within reasonable geographic distances of the students' residences." (A. 43). Many decisions made by petitioners were unaffected by that policy. *See* pp. 8-10, above. Those decisions affected by the policy still permitted school board discretion so long as the reasonable walking distance requirement was generally followed. *See* pp. 6-8, above. In examining the decisions made by petitioners in areas unrelated to the policy and in reviewing the choices made by them within the parameters of the policy, both courts found a pattern of discriminatory decision-making. *See* pp. 10-11, above. Regarding the district court's findings as to adherence to the neighborhood school policy, the court of appeals stated:

> Reading the neighborhood-school-policy finding just referred to with the other findings, it is apparent that the former were not meant to describe all cases and that the court did not, as defendants contend, find that their challenged actions were entirely motivated by a racially neutral intent to adhere to a neighborhood school policy. (A. 17).

The court then listed specific instances from the record to illustrate its interpretation.

The standard employed by the appellate court in reviewing the trial court's findings is not novel, even though

a new term, presumption of consistency, was used to describe it. Other courts have held that findings should be liberally construed and found consonant with the judgment if the judgment has support in the record.[11] To construe the district court's findings in any other way would do violence to its opinion. Can there be any doubt that the trial judge would state the following if he found, as petitioners assert, that school board actions were racially neutral:

> ... [S]chool authorities constantly alleged throughout this case that certain characteristics of black school children make their separation from other children "reasonably necessary and desirable from an educational point of view." School authorities assert that they never discriminated against black students because of the color of their skin, but that the requirements of "quality" education necessitated the separation of black children, or as school authorities prefer to say, "children from the lower socio-economic groups."
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> The fallacy in the school authorities' reasoning is that they assume that educationally undesirable characteristics are common to all black children and that therefore they are permitted to run a segregated school system. This the law prohibits them from doing. I am not passing on the question of whether or not school authorities can separate school children based on certain behavioral or attitudinal characteristics, but in any event that is not what the Milwaukee school authorities did. They did not separate the high achievers from the low achievers, the non-

[11] *See* Manning v. Jones, 349 F.2d 992, 996 (8th Cir., 1965); Gilbert v. Sterrett, 509 F.2d 1389, 1393 (5th Cir., 1975), cert. denied 423 U.S. 951 (1975); Freeman v. Gould Special Dist. of Lincoln County, 405 F.2d 1153, 1156 (8th Cir., 1969); Blumenthal v. U.S., 306 F.2d 16, 17-18 (3rd Cir., 1962).

> delinquent from the delinquent, the manageable from the unmanageable, the passive from the violent, and the good from the bad. They just simply separated most of the blacks from most of the whites, and that they may not do under our Constitution, even if it results, on the average, in a better education for everyone. (A. 132-134).

II. THE FINDING THAT THE SCHOOL SYSTEM WAS SEGREGATED IN FACT IS CORRECT.

Petitioners contend that the lower courts failed to find segregation in fact because the district court did not find any school to be segregated as defined in *Keyes*. (Pet. 29-30). In determining if segregation exists, the trial court is required to take into consideration student and faculty racial composition and community and administration attitudes toward schools. 413 U.S. at 196. *Keyes* did not indicate that each of these elements is indispensable to a finding of segregation. What is or is not a segregated school, *Keyes* noted, depends on the facts of each case. 413 U.S. at 196.

The trial court here found that the Milwaukee school system as a whole was segregated, (A. 130), and the court of appeals affirmed. (A. 12). In finding that the entire system was segregated, the trial court cited statistical evidence and made findings as to the student and faculty racial composition of the system's schools. (A. 79-80, 108-109). These statistical findings, the court of appeals stated, were sufficient to support the trial court's finding of segregation in fact. (A. 12). These findings are similar to those made by other courts in determining the

existence of segregation in fact."[12] Moreover, other findings made by the district court in this case, when reasonably construed with findings as to racial composition, support the inference that school officials and the community perceived schools as being either black or white. The findings that white students living in black school districts used the open transfer system to attend white schools, (A. 16, 69), indicates that the community perceived schools as being either black or white. Petitioners' efforts to keep students separated by race further demonstrates that school officials thought of schools in terms of black and white. The record also contains petitioners' own statement of policy, which shows their perception of inner city schools as being black:

> To grasp with deep understanding and staunch purpose the basic fact that the hope of short and long term accomplishments for central city *Negro* schools lies in massive compensatory education. . . . [emphasis added].

III. THE CLEARLY ERRONEOUS STANDARD OF REVIEW IS IN ACCORDANCE WITH PRINCIPLES ANNOUNCED BY THIS COURT.

The court of appeals applied the clearly erroneous standard in reviewing the district court's finding of segregative intent. (A. 13). In doing so, the appeals court

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[12] *See,* for example, Oliver v. Kalamazoo Board of Education, 368 F. Supp. 143 (W.D. Mich., 1973), aff'd sub nom. Oliver v. Michigan State Bd. of Ed., 508 F.2d 178 (6th Cir., 1974), cert. denied 421 U.S. 963 (1975); and Morgan v. Hennigan, 379 F.Supp. 410 (D. Mass., 1974), aff'd sub nom. Morgan v. Kerrigan, 509 F.2d 580 (1st Cir., 1974), cert. denied 421 U.S. 963 (1975).

reexamined school board actions and testimony which the trial court found evidenced that intent, (A. 126-130), determined that the trial judge's reliance on these factors was permissible, and concluded that the finding of segregative intent was not clearly erroneous. (A. 14-20). This standard of review is in accord with Rule 52 (a), Fed. R. Civ. P., and well-established appellate principles. *See United States v. United States Gypsum Co.,* 333 U.S. 364, 394-395 (1948), and *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 123 (1969). This standard is peculiarly appropriate for reviewing a finding of intent. *United States v. Yellow Cab Co.,* 338 U.S. 338, 341-342 (1949). Morover, its use is consistent with the "salutary principle" stated in recent civil rights actions "that great weight should be accorded findings of fact made by district courts in cases turning on peculiarly local conditions and circumstances." *Mayor of City of Phila. v. Education Equality League,* 415 U.S. 605, 621n.20 (1974), and *White v. Register,* 412 U.S. 755, 769-770 (1973).

IV. THE IMPLEMENTATION OF A REMEDY IN THIS CASE HAS NOT DENIED PETITIONERS THEIR APPEAL RIGHTS.

The petition states:

> The deprivation of more than cursory appellate review in cases like the instant one by imposing immediate relief should not be condoned. Meaningful appeal is denied if limited in any way because a remedy is in process. (Pet. 34).

In making this statement, petitioners have indirectly accused the court of appeals of ignoring their appellate rights. If petitioners have evidence on which they base

this aspersion, they should bring it forth and directly make their accusation. If not, they should refrain from reliance on innuendo. In this case, which relates to liability only, petitioners were given a full and fair appeal. The court of appeals did not deny petitioners their appellate rights; it merely rejected the merits of their appeal. The implementation of a remedy did not affect the appellate court's affirmance of liability.[13]

Petitioners' assertion that a reversal of the court of appeals' decision will have little effect on Milwaukee's desegregation program, (Pet. 35), is similarly unwarranted. This assertion is not only beyond the scope of this appeal and outside the record on appeal; it is also contradicted by the record before the district court on development of a remedy. In support of their assertion, petitioners state:

> Prior to the District Court's decision on liability, the Board initiated development of a voluntary integration program based upon educational incentives. The Board adopted a "Statement on Education and Human Rights" on September 2, 1975. (Pet. 35).

In reference to this voluntary integration program, Dr. John A. Gronouski, the special master appointed by the district court stated in his report to the court that "[i]n short, the School Board, while giving lip service to a September Voluntary Integration Plan, refused to provide the Superintendent with the means of carrying it out." (Special Master's

[13] Petitioners' reference to 20 U.S.C. §1752, (Pet. 34n.21), is misplaced since this case arises under the Fourteenth Amendment of the Constitution. *See* 20 U.S.C. §1702(b) and Brinkman v. Gilligan, 518 F.2d 853, 856 (6th Cir., 1975), petition for cert. filed 45 U.S.L.W. 3390 (U.S., Oct. 18, 1976) (No. 76-539). As to the propriety of implementing a desegregation remedy prior to exhaustion of all appellate rights, *see generally* Keyes v. School District No. 1, Denver, 396 U.S. 1215 (1969).

Progress Report, May 24, 1976, at p. 4). Later, at a hearing before the district court on the proposed plans for desegregation, the special master added:

> My deepest concern, and Milwaukee's most serious dilemma, is the wholly negative attitude of the bare majority presently in control of the School Board. It has adamently [sic] refused to countenance any significant positive movements towards developing a meaningful integration plan, or towards implementing the largely voluntary interim plan contained in my May 24 progress report. (Transcript of Proceedings, June 9, 1976, at p. 6).

At that same hearing, the district judge directed petitioners to submit a new plan and, in doing so, referred to the plan proposed by petitioners pursuant to their September statement:

> I think it is only fair, since I am going to put this back — send this back to the Board, I think it is only fair that I state that I think, right or wrong, that this Court's view that the present plan, whatever that is, is really no plan at all except it's kind of a hope. Now that may not be right. I'm not asking you to agree with the Court, but you might as well know that I don't think that that plan, after they rejected Dr. McMurrin's [the Superintendent of Schools'] Plan and came up with what your client [petitioners] calls a plan, that doesn't offer any hope or expectation of resulting in any significant form or identifiable form of desegregation in September. And, under the Constitution, this Court could not accept such a plan. So we can spend two or three days belaboring the point, but I think your client is entitled to know, right or wrong, what the judge's view is of that. . . . (Transcript of Proceedings, June 9, 1976, at p. 44).

The implementation of a remedy should not affect the appellate rights of either petitioners or respondents.

Contrary to petitioners' assertion, however, the record in this matter indicates that judicial supervision, rather than petitioners' "Statement on Education and Human Rights," is required to vindicate the constitutional rights found violated by both lower courts.

CONCLUSION

This is a typical northern school desegregation case. Petitioners' invocation of their neighborhood school policy as a cover for their intentionally segregatory decision-making is not a meritorious defense, for this Court has mandated that lower courts indict "evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'" *Cooper v. Aaron,* 358 U.S. 1, 17 (1958). The court of appeals and the district court fulfilled this mandate and found that respondents proved the three elements of *de jure* segregation. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976
No. 76-809

THOMAS BRENNAN, et al.,

Petitioners,

v.

KEVIN ARMSTRONG, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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Petitioners, pursuant to Supreme Court Rule 24, respectfully submit this reply to the Respondents' Brief in Opposition (R. Br.).

SUMMARY STATEMENT

Respondents do not answer petitioners' primary argument in their Petition for Certiorari (Pet.) that a conclusion of system-wide, intentional segregation is contrary

to the District Court's specific findings of fact unless the Milwaukee School Board's good faith use of a racially neutral neighborhood school policy is unconstitutional *per se*. Respondents do not challenge the District Court's specific findings that racial imbalance in Milwaukee's schools is due to residential patterns and the neighborhood school policy, and no case exists which includes both such specific findings and a conclusion of intentional segregation.

Instead, respondents attempt to divert attention from the "unexplained hiatus" between the District Court's conclusion and its specific findings of fact by relying upon general racial statistics and tenuous inferences from random District Court findings. General statistics and tenuous inferences do not eliminate specific court findings. Statistics disclosing racially imbalanced schools are mere reflections of racially imbalanced neighborhoods,[1] just as statistics disclosing numerous racially balanced schools[2] reflect integrated neighborhoods.

Although neither the District nor Circuit Courts expressly held Milwaukee's neighborhood school policy unconstitutional *per se*, that is the inescapable effect; the decisions cannot be sustained under any other theory, for they patently conflict with *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, U.S. , 45 U.S.L.W. 4073 (U.S. Jan. 11, 1977), *Washington v. Davis*, 426 U.S. 229 (1976) and *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

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1 As of 1970, about 90% of the City's black population resided in a contiguous area 65-75% black overall, "ranging from about 40% on the periphery to 75-80% and more near the center" (A.42).

2 *See* A.108 – as of the 1972-73 school year, 37 of 155 schools were between 10% and 67% black.

If it is permissible to infer system-wide segregative intent in the face of the findings of the District Court here, the results of future school litigation will be, as Mr. Justice Powell observed in *Keyes*, 413 U.S. at 233, "fortuitous, unpredictable and even capricious," for surely school officials everywhere could hope for no more than to convince a court that they have consistently and uniformly adhered to a neighborhood school policy in the good faith belief that it provided the best educational opportunity for all students regardless of race.

Because the decision of the Circuit Court is of singular importance to every neighborhood school system throughout the United States, it must be reviewed by this Court. Petitioners do not ask this Court to review the evidence to determine if the District Court's findings of fact, as affirmed, were correct. As petitioners rely upon the express findings of the District Court, respondents' attempted invocation of the "two court rule" (R.Br. 4) is without merit.

I. RESPONDENTS FAIL TO REBUT THE ARGUMENT THAT THE LOWER COURTS HELD MILWAUKEE'S NEIGHBORHOOD SCHOOL POLICY UNCONSTITUTIONAL *PER SE*.

Fair consideration of this Petition requires a careful reading of the entire lower court findings of fact. Among those findings are that (a) petitioners uniformly and consistently adhered to a neighborhood school policy adopted decades before there were substantial numbers of black pupils in the school system (1919), in the good faith belief that this best promotes quality education for all pupils, regardless of race, (b) this policy was of decisive importance in all decisions concerning how and where students would be educated, (c) decision alternatives which would have produced greater racial balance in the schools were not adopted because inconsistent with the neighborhood school policy, (d) racial residential concentration exists in

Milwaukee, (e) the evidence would not support a finding that either racially imbalanced schools or government action caused the racial residential concentration, and (f) schools presently having student bodies 70% or more nonwhite are the result of the interaction of the neighborhood school policy and present racial residential patterns (Pet. 9-11; A.58-59, 132).

These findings are specific, direct and clear. They are based on peculiarly local conditions and circumstances and should be given great weight by appellate courts.[3] Yet, the District and Circuit Courts found petitioners guilty of system-wide segregative intent.[4]

The best proof that a neighborhood school policy has been held unconstitutional *per se* and an affirmative racial balance duty imposed, is to ask the question: What else could petitioners conceivably have hoped to prove at trial other than what the District Court expressly found? Having convinced the District Court of the just cited findings, and others similarly favorable, what else could petitioners have done?

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3 Respondents observe that " 'great weight should be accorded findings of fact made by district courts in cases turning on peculiarly local conditions and circumstances.' " (R.Br. 19). Petitioners agree, but note that (1) they, not respondents, rely on the non-ultimate findings of fact made by the District Court, (2) findings of consistent, uniform, good faith adherence to a neighborhood school policy should preclude a conclusion of unconstitutionality nation-wide, regardless of local conditions or circumstances, and (3) nation-wide, cases must be decided on the basis of evidence presented in the courtroom rather than on intuition or non-specific feelings.

4 The general, racial statistical findings of the District Court do not support respondents' position. Under *Davis*, the fact that the schools are not racially balanced does not, standing alone, support a conclusion that petitioners were guilty of segregative intent. Certainly if racial statistics alone do not support such a conclusion, the addition of the factor of "good faith adherence" makes such an inference impermissible.

The District Court's answer to these questions, as affirmed, was to require petitioners to show that in the case of every policy decision, they acted affirmatively to promote racial balance. For example, the District Court concluded:

> "In Milwaukee, none of these [petitioners'] decisions ever resulted in any significant or noticeable degree of desegregation in the school system, and practically all of them resulted in greater segregation.
>
> * * *
>
> "The actions of Milwaukee school officials can be usefully contrasted with those of the school system in Grand Rapids, Michigan. In upholding the trial court's decision in favor of the school authorities in that case, the Court of Appeals placed reliance on certain steps taken to advance desegregation and to prevent further segregation.
>
> * * *
>
> "In contrast, Milwaukee school authorities were in this case not able to point to one thing they had done to prevent segregation or to desegregate the schools."[5] (A.129-130)
>
> "The record indicates that the school authorities always had a nondiscriminatory explanation for their acts.
>
> * * *
>
> "These and similar explanations on an isolated basis seem reasonable and at times educationally necessary. In and of itself, any one

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5 As found by the District Court, petitioners did in fact adopt programs to improve racial balance where they did not destroy the neighborhood school policy, e.g., an affirmative solicitation program to increase black attendance at Milwaukee Tech, the City's one city-wide school (A.98), staff profiling so as to build integrated teaching staffs (A.76-77) and the open transfer program (A.8, 67,68). While the open transfer program may be classified as a departure from the neighborhood school policy, the fact that such transfers were permitted only when space was available with first priority going to students who desired to attend their *neighborhood* school (A.68) discloses that the program was neighborhood school policy consistent.

> act or practice may not indicate a segregative intent, but when considered together and over an extended period of time, they do. . . . *It is hard to believe that out of all the decisions made by school authorities under varying conditions over a twenty-year period, mere chance resulted in there being almost no decision that resulted in the furthering of integration.*" (A.125-126) (emphasis added).[6]

The Circuit Court's reliance on the "most segregative option" concept (A.18) is likewise an imposition of an "affirmative duty;" it is deficient as a matter of law. *See* pp. 10-11, *infra*. To require that an otherwise racially neutral, geographic student assignment policy affirmatively take race into account is to hold that neutral policy unconstitutional *per se*.

II. RESPONDENTS APPLY IMPROPER LEGAL TESTS.

Although respondents and the Circuit Court each recite the magic words "totality of relevant facts"[7] it is clear that the actual legal tests applied are those of (a) racially disproportionate impact and (b) affirmative duty to integrate – the same tests most recently condemned in

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6 The District Court misunderstands probability theory. In a school system in which there is a great degree of racial residential concentration, and in which school authorities adhere in good faith to a neighborhood school policy, "chance" should be expected to produce few decisions with positive racial balance effects. Indeed, racially imbalanced schools are the inevitable result of continued adherence to a racially neutral neighborhood school policy in a system which becomes racially residentially concentrated.

7 A more apt description of the analyses of the District Court, the Circuit Court and respondents is selective potpourri of inferences. *See, e.g.*, respondents' reliance on inferences at pp.9-11 of their Reply Brief.

Village of Arlington Heights v. Metropolitan Housing Development Corp., supra, where this Court reiterated that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact."[8] 45 U.S.L.W. at 4077.

In *Arlington Heights*, this Court identified and discussed seven subjects of proper inquiry in determining whether a racially discriminatory intent or purpose exists. Analysis of the seven subjects in terms of the instant case brings into clear focus the absence of such intent or purpose. The seven subjects of inquiry are (45 U.S.L.W. at 4077-78):

(1) Statistical impact of official action;

(2) The historical background of the challenged decision;

(3) The specific sequence of events leading up to the challenged decision;

(4) Departures from the normal procedural sequence;

(5) Substantive departures;

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8 Both lower courts, in effect, violate the racially disproportionate impact rule by inferring segregative intent from petitioners' failure to show that student racial balance was improved by their neighborhood school policy decisions. The Circuit Court repeats the error with respect to teachers:

> "It could further *have been inferred* that teacher assignments not governed by the collective bargaining agreement were not made in accordance with racially neutral principles. *Teacher imbalance existed before the transfer provision was adopted.*" (A.17) (emphasis added).

The Circuit Court's conclusion is clear: the fact of prior racial statistical imbalance of teachers is alone sufficient to justify an inference of discriminatory purpose.

(6) Legislative or administrative history, especially where there are contemporary statements by members of the decision making body, meeting minutes or reports; and

(7) Testimony of members of the decision making body concerning the purpose of the official action.

The decisions challenged by respondents involve the adoption and consistent application of a neighborhood school policy. When each of the seven factors are applied to petitioners' decisions over the years, no racially discriminatory purpose is disclosed:

(1) The pupil racial imbalance of the Milwaukee schools is a direct "result of the interaction of the neighborhood school policy and present racial residential patterns" (A.59). As the District Court concluded that the racial makeup of the schools did not cause racial residential concentration (A. 132), petitioners' decisions had no disparate, statistical impact.[9]

(2) The historical background of the neighborhood school policy in Milwaukee set forth in District Court

9 While the District Court acknowledged the absence of a "direct statistical relationship" between boundary changes and the racial percentages of schools involved in those changes, it nevertheless drew an adverse inference therefrom due to a "short-term impact" on the timing of student racial change (A. 49-50). Such an inference is improper. Additionally, with respect to respondents' citation to statistics concerning faculty racial imbalance (R.Br. 3), the facts are that most schools with predominantly black student populations had predominantly white faculties (A. 109).

findings does not disclose any discriminatory intent. *See, e.g.*, Pet. 8-11. The policy's adoption in 1919, long before there were a significant number of blacks residing in the district, and the good faith adherence thereto since that time for sound educational reasons without regard to race, indicate a nondiscriminatory history.

(3) Nothing in the record or the District Court's findings identifies, with respect to any challenged decision, a sequence of events suggesting discriminatory intent.

(4) No claim has been made that petitioners ever departed from normal decision making procedures with respect to any challenged decision.

(5) Throughout all the years at issue in this case, petitioners departed in only one instance, the open transfer policy, from a pure neighborhood school policy. The purpose of that departure was to enhance racial integration (Pet. 28-29; A.8, 67, 68).[10] The District Court's finding that all policy decisions conformed with the neighborhood school policy is not refuted by respondents. Indeed, the District Court found that policy alternatives which would have improved racial balance were not adopted because of inconsistency with the neighborhood school policy (A.59).

(6) The District Court's findings concerning the history of the neighborhood school policy indicate that the policy was adopted and consistently applied for sound educational

10 "In 1964, Board member Golightly (who is black) and the NAACP made such a proposal. It was argued that affording students an opportunity to choose to attend schools located outside their residential neighborhoods would lead to racial integration in the system's schools. The Board adopted the Open Transfer proposal upon the recommendation of the Committee on Equal Educational Opportunity, then chaired by member Story." (A.68)

reasons (A. 44, 102-107). There is no finding or evidence concerning statements by Board members or meeting minutes or reports which indicate that racial motivation played *any* role in decisions made.

(7) Although Board members testified at trial, there are no findings that racial motivation played a role in their decision making. Indeed, there is a specific finding that

> "[E]ven Board members inclined toward affirmative action to attain racial goals agree that the majority Board members' views and decisions to the contrary *were not motivated by any desire to discriminate against or otherwise 'shortchange' black students.* To the contrary, *the majority members had as their objective quality education for all.* From their point of view, quality education required adherence to the neighborhood school policy even though that policy necessitated the creation of segregated schools." (A.107) (emphasis added).

In addition, this Court in *Arlington Heights* makes clear that even if discriminatory intent were present in this case, the lower court conclusions are incorrect as a matter of law:

> "*Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision.* Such proof would, however, have shifted to the Village the burden of establishing *that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose.* In such circumstances, there would be no justification for judicial interference with the challenged decision." 45 U.S.L.W. at 4078, n.21 (emphasis added).

See, also, Mt. Healthy City School District Board of Education v. Doyle, U.S. , 45 U.S.L.W. 4079 (U.S. Jan. 11, 1977).

Hence, even if the District Court could be deemed correct in concluding that a segregative intent was involved in certain actions of petitioners, there is no basis for judicial intervention in the Milwaukee school system; racial imbalance would have resulted in any event from the interaction of petitioners' uniform, consistent, good faith adherence to the neighborhood school policy and racial residential concentration.[11]

The Court of Appeals for the Seventh Circuit essentially held in *Arlington Heights*, 517 F.2d 409 (7th Cir. 1975), that the Village had a constitutional "affirmative duty" to desegregate housing in the Chicago metropolitan area. Although respondents' and the Seventh Circuit's rationale here is more subtle than in *Arlington Heights*, they seek to impose a similar "affirmative duty" in a school context.

III. RESPONDENTS FAIL TO REBUT PETITIONERS' ATTACK ON THE CIRCUIT COURT'S USE OF A PRESUMPTION OF CONSISTENCY AND THE "CLEARLY ERRONEOUS" STANDARD OF REVIEW.

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11 Footnote 21 in *Arlington Heights* mandates a two-step analysis in cases involving allegations of discriminatory purpose. If proof that a governmental action was motivated in part by a racially discriminatory purpose is established in step 1, it triggers a shifting of the burden of explanation to the defendant. In the instant case, both lower courts found discriminatory purpose *as a result* of shifting the burden of explanation. The District Court applied a "constitutionally suspect" standard to decisions such as school siting, school renovations, etc., and then, because petitioners' decisions did not improve racial balance, inferred segregative intent. (A. 128-130).

The cases cited in footnote 11 of Respondents' Reply Brief miss the point of petitioners' attack on the presumption of consistency approach to appellate review. None of those decisions involved a claim that specific District Court findings were contrary to, and indeed precluded, the ultimate conclusion reached. In each of the cited cases, the appellate court instead merely filled a void in the findings; no appellate court interpreted the findings and record so as to negate specific findings as did the Circuit Court in this case.

Respondents likewise leave unexplained the mystery of how the Circuit Court can properly employ a "clearly erroneous" standard of review to affirm the ultimate conclusion of intentional segregation[12] while at the same time digging deep into the trial record[13] on a selective basis in an attempt to eliminate, *sub silentio*, findings inconsistent with both Courts' ultimate conclusion.

CONCLUSION

The decisions of the District and Circuit Courts subject the Milwaukee Public Schools to federal judicial intervention and control. Under prior decisions of this Court, that intervention and control are improper because a neighborhood school policy is not unconstitutional *per se*.

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12 "[W]e conclude that the District Court *was not clearly erroneous* in finding that defendants acted with the intent of maintaining racial isolation. While arguably no individual act carried unmistakable signs of racial purpose, *it was not unreasonable* to find a pattern clear enough to give rise to a permissible inference of segregative intent." (A. 20) (emphasis added).

13 *See, e.g.*, (A.10) (one board member's testimony concerning faculty staffing which was not elevated to a finding and is inconsistent with a specific finding – *see* Pet.27); (A.16) (testimony of an assistant superintendent concerning the open transfer program which was not elevated to a finding and which is also inconsistent with specific findings indicating that the program was adopted with racial balance improvement motivations – *see* Pet.28-29; A.8, 67, 68).

Petitioners have adhered in good faith to a neighborhood school policy since 1919. During the past quarter century, a doubling of overall student population and a rapid and extraordinary growth in black student population and residential density have necessitated a succession of difficult decisions. Through it all petitioners have maintained quality facilities, programs and staffs for all students, avoided double-shifts, provided compensatory education, coped with complex policy questions and yet have successfully preserved the deeply felt benefits of the neighborhood school policy. If the Equal Protection Clause is to be construed to require abandonment of neighborhood school policies adopted and pursued in good faith, then the pronouncement should issue only from this Court. The Petition for Certiorari should be granted.

Respectfully submitted,

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